(1)

No. 031646 JUN 8 2004

In The
# Supreme Court of the United States

JESUS CANTU,

*Petitioner,*

versus

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

**On Petition For A Writ Of Certiorari**
**To The Fifth Circuit Court Of Appeals**
**At New Orleans, Louisiana**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. DOES THE PRESENCE OF "MIXED-MOTIVES" ON THE PART OF A PROSECUTOR IN STRIKING A JUROR ON THE BASIS OF RACE OR ETHNIC ORIGIN RENDER AN ADMITTED *BATSON* VIOLATION INCONSEQUENTIAL?

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for JESUS CANTU certifies that this is a civil case (a writ of habeas corpus) arising out of a state court criminal conviction and that the persons having an interest in the outcome of this case are the Appellee, the State of Texas by and through the Director of the Texas Department of Criminal Justice, Doug Dretke and the following persons and counsel:

JUDGES:

STATE COURT:

Honorable Judge Joe Drago (now retired)
Criminal District Court No. 4
Tarrant County, Texas

FEDERAL COURT:

Honorable United States Judge Sidney A. Fitzwater
U.S. District Court for the Northern District of Texas
United States Courthouse
Dallas, Texas

Honorable United States Magistrate Judge
Paul D. Stickney
United States Courthouse
Dallas, Texas

APPELLANT:

Jesus Cantu
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(Deportation to Mexico)

**CERTIFICATE OF INTERESTED PARTIES** – Continued

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**CERTIFICATE OF INTERESTED PARTIES** – Continued

These representations are made in order that Judges of this Honorable Court may evaluate possible disqualification or recusal pursuant to Local Rule 28.2.1.

_____

DANNY D. BURNS

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## TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the final decision of the Federal Fifth Circuit Court of Appeals in this case. The Opinion was issued on March 10, 2004 and no motion for rehearing was filed.

## OPINIONS BELOW

A jury in the Tarrant County Criminal District Court No. 4 convicted Petitioner of possession of over 50 pounds but less than 2000 pounds of marijuana. (Appendix A) Petitioner was sentenced to 20 years confinement and a $10,000.00 fine. His conviction and sentence were upheld on direct appeal by the Texas Second Court of Appeals. (Appendix B) The Texas Court of Criminal Appeals denied review on April 25, 2001. (Appendix C) A timely filed application for writ of habeas corpus was denied on August 14, 2002. (Appendix D) Petitioner timely filed for habeas corpus relief in federal court in the Northern District of Texas on August 16, 2002. The Federal District Court in Dallas, Texas adopted the Findings, Conclusions and Recommendations of the United States Magistrate Judge. (Appendix E) The Federal District Court denied the Motion for Writ of Habeas Corpus filed pursuant to 28 USC §2254. (Appendix F) The Federal District Court denied Petitioner a certificate of appealability. (Appendix G) The Petitioner requested a certificate of appealability from the Fifth Circuit Court of Appeals which denied the request on March 10, 2004 after finding that the Petitioner failed to make a substantial showing of a denial of a constitutional right. (Appendix H) The Petitioner timely

filed his Application for a Writ of Certiorari to the Fifth Circuit Court of Appeals which was due to be filed on or before June 8, 2004.

## JURISDICTION

This Honorable Court has jurisdiction to review a final decision of a Court of Appeals in which a decision could be had pursuant to 28 USC §1254, 28 USC §1257, 28 USC §2101, and 28 USC §2104.

## STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America, which reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States of America, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition Below.

The Petitioner Mr. Jesus Cantu was indicted for possession of more than 50 pounds but less than 2000 pounds of marijuana. A jury convicted Mr. Cantu and it assessed a twenty (20) year prison term and a $10,000.00 fine.

The Texas Second Court of Appeals affirmed his conviction and sentence on direct appeal in an unpublished opinion in ***Cantu v. State***, 02-98-591-CR (Tex.Ct.App. – Fort Worth, 2000, Pet. ref'd). The Texas Court of Criminal Appeals, the highest Court of Criminal jurisdiction in Texas, refused review in ***Cantu v.***

***State***, No. 00-1993. Petitioner filed an application for writ of habeas corpus in State court which was denied by the Texas Court of Criminal Appeals on August 14, 2002 in ***Ex Parte Cantu***, 52,780-01.

Petitioner took his case to federal court on August 16, 2002 by filing an application for writ of habeas corpus in the federal district court in Dallas, Texas. This application for writ of habeas corpus was denied on August 7, 2003. An application for a certificate of appealability was denied by the district court. The Fifth Circuit Court of Appeals denied a timely filed application for a certificate of appealability on March 10, 2004.

**B. Statement of Facts.**

In September 1994, Officer Michael Kennedy, of the Tarrant County Drug Task Force, suspected that Cantu was distributing marijuana. Officer Kennedy learned that Cantu lived at 1210 Lee Avenue in Fort Worth, and that he leased a warehouse at 700 N. Throckmorton in Fort Worth. RR Vol. III 26-27. Officer Kennedy began a program of close surveillance, mostly by means of camera installed in the police headquarters in downtown Fort Worth. RR Vol. III 37. Officer Kennedy observed that although Cantu frequently visited the warehouse by himself, there was nothing to indicate that any sort of legitimate business was being conducted in the warehouse – no daily work activity, no employees visible. RR Vol. III 42. Officer Kennedy never observed anyone ever visit the warehouse in Cantu's absence. RR Vol. III 43. Despite an abundance of parking space, visitors to the warehouse never parked outside, but always drove into the warehouse and shut the doors. RR Vol. III 45-46. When vehicles

left the warehouse, they did not exit until Cantu had walked outside and looked up and drove down the street; and when leaving the warehouse at night, vehicles pulled away from the warehouse before turning their headlights on. RR Vol. III 47-48.

Officer Kennedy obtained a warrant to search the warehouse. RR Vol. III 51. On November 30, 1994, around 7:00 p.m., he and a group of officers forced their way into the warehouse. RR Vol. III 56. Cantu was not present. RR Vol. III 56. There were no office-type furnishings, but there was some construction equipment, bearing a "thick coat of dust" which showed that it had not been used in a long-time. RR Vol. III 63-64. Officer Kennedy noticed an "overwhelming odor of bulk marijuana," which was strongest in the vicinity of a large vault. RR Vol. III 62, 64. The vault contained two "large deep freezers" and numerous boxes stacked on top of them. RR Vol. III 65. The boxes were found to contain "large compressed bulk bales" of marijuana. RR Vol. III 71. The freezers, which were plugged in and operational, were "filled to capacity with large compressed bulk bundles of marijuana." RR Vol. III 71, 72. The marijuana weighed approximately six hundred pounds. RR Vol. III 72. The total number of blocks of marijuana found in the vault came to eighty-three. RR Vol. IV 15.

The officers also found wrapping materials that had marijuana residue on them, and that emitted a strong odor, indicating that they had been used to wrap bundles of marijuana. RR Vol. III 76. They also found scales, of a kind commonly used to weigh large quantities of marijuana, and two firearms, at least one of which was loaded. RR Vol. III 70-71, 77-78.

Immediately following the search of the warehouse, Officer Kennedy obtained a warrant to search Cantu's house at 1210 Lee Avenue. RR Vol. III 80-82. He and the other officers arrived at Cantu's house around 10:00, on the same evening that they raided the warehouse. RR Vol. III 88. They entered the residence and gave Cantu his Miranda warnings. RR Vol. III 90-91. Officer Kennedy found about $15,000 in cash behind a loose door frame, RR Vol. III 95.

In addition to the house at 1210 Lee, Cantu also owned a house located at 1207 Clinton, which was directly behind the house on Lee. RR Vol. III 115-16. Cantu consented, in writing, before a witness, to Officer Kennedy's request to search the house on Clinton. RR Vol. III 116-17. Officer Kennedy discovered an opening in the floor of a closet that led to an underground room. RR Vol. III 122. The underground room contained, scales, three safes, a bag of wrappers for wrapping bundles of money, some marijuana stems and seeds. RR Vol. III 122-25. Cantu opened the three safes. RR Vol. III 125. They contained between them $579,010 in cash. RR Vol. III 126.

The following afternoon, as he was sifting through the documents he had seized the night before, Officer Kennedy found evidence that Cantu had rented a mini-warehouse at 1850 Ephriham. RR Vol. III 129-36. That evening, Officer Kennedy drove to Cantu's residence at 1210 Lee Avenue and questioned him about the mini-warehouse. RR Vol. III 130. The next morning Officer Kennedy drove to the mini-warehouse when it opened, at 8:00, and found Cantu sitting in a van near the mini-warehouse. RR Vol III 133. When Cantu saw Officer Kennedy he drove off. RR Vol. III 133. Officer Kennedy chased Cantu, pulling him over. RR Vol. III 133. Cantu, "in a very frustrated manner,"

gave written permission for Officer Kennedy to search the mini-warehouse. RR Vol. III 134. Inside Officer Kennedy found, among other things, "two large diesel gas tanks" that contained hidden compartments. RR Vol. III 136. Cantu told Officer Kennedy that because all his money had been seized in recent raid, he was broke, and had come to the mini-warehouse to retrieve the gas tanks so that he could sell them to a narcotics trafficker. RR Vol. III 137.

## REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting the writ. The failure of the lower federal district and circuit courts to this Honorable Court's decision clearly set out in ***Batson v. Kentucky***, 476 U.S. 79 (1986) and even more adamantly decided in ***Powers v. Ohio***, 499 U.S. 400 (1991) that discrimination against jurors on the basis of race or ethnic origin cannot be tolerated. The lower courts in the federal system have taken the stance that if the State can create a "mixed-motive" for striking a juror, then racial prejudice will be overlooked. This Honorable Court recently addressed an analogous situation with ***Miller-El v. Cockrell***, 537 U.S. 322 (2003). This Court specifically held in applying ***Batson*** that " . . . the issuance of a COA can be supported by any evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based." ***Miller-El v. Cockrell***, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). In ***Miller-El***, this Court made clear that race based strikes were unconstitutional despite neutral explanations by the prosecution.

Another important reason for this Court to grant certiorari is the split between the lower federal courts and the State courts which have recognized that "mixed-motives" do not remove the unconstitutionality of race based strikes. SEE: ***Powers v. Palacios***, 813 S.W.2d 489 at 491 (Tex. 1991); ***State v. Lucas***, 18 P.3d 160 at 163 (2001); ***Payton v. Kearse***, 329 S.C. 51, 495 S.E.2d 205 at 210 (1998); ***Ex Parte Stockwell***, 675 So.2d 38 at 41 (Ala. 1995). The Texas Court of Criminal Appeals has parted with the Texas Supreme Court and adopted the "mixed-motives" basis of allowing discriminatory strikes to stand. SEE: ***Guzman v. State***, 85 S.W.3d 242 (Tex.Crim. App., 1994). This Honorable Court should grant certiorari in order to establish that race based strikes are unacceptable even if acceptable reasons and motives are mixed in with the impermissible. Poison remains poison even though mixed with an everyday drink. This Honorable Court should grant review to end this invidious holdover from Jim Crow laws.

## I.

## DOES THE PRESENCE OF "MIXED-MOTIVES" ON THE PART OF A PROSECUTOR IN STRIKING A JUROR ON THE BASIS OF RACE OR ETHNIC ORIGIN RENDER AN ADMITTED *BATSON* VIOLATION INCONSEQUENTIAL?

The Supreme Court made clear that the use of race or other constitutionally unacceptable categories of discrimination for the exercise of peremptory challenges violates the Constitution. ***Batson v. Kentucky***, 476 U.S. 79 (1986). The Court found the use of race so intolerable that it denied the use of race based peremptory strikes in civil cases as well. ***Powers v. Ohio***, 499 U.S. 400 (1991). This

Court has never allowed a valid, constitutional reason for acting to trump an act of unconstitutional proportions. If the State's attempts to raise revenue resulted in denying the vote to the poor, this Court declared the poll tax unconstitutional, even though the revenue aspect of the poll tax was permissible. ***Harper v. Virginia State Board of Elections***, 383 U.S. 663, 36 L.Ed.2d 169, 86 S.Ct. 1079 (1966). In the ***Batson*** context, just recently this Court reaffirmed that it is the race based use of the strike that decides and not other "mixed-motives." In ***Miller-El v. Cockrell***, 537 U.S. 322 at 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), this Court noted that "In the context of the threshold examination in this ***Batson*** claim the issuance of a COA can be supported by any evidence demonstrating that, **despite the neutral explanation of the prosecution**, the peremptory strikes in the final analysis were race based." If the prosecutor's motive was racial, the pure motives have been blanked and are no longer of any import. As this Court noted in ***Miller-El***, supra at 340, "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." What the lower courts are doing in their misreading of ***Batson*** and the application of the "mixed-motives" exception to non-discrimination amounts to a complete abandonment and abdication of judicial review and of the courts' obligations to uphold the Constitution.

When this Court has struck down instances of racial prejudice effected under the color of law, the fact that legitimate motives may be mixed in with the invidious intent to discriminate has not saved the discriminatory practice. The poll tax produces legitimate revenue for the States but because of the invidious discrimination based upon wealth it is unconstitutional if it prevents the poor

from voting. ***Harper v. Virginia State Board of Elections***, 383 U.S. 663, 36 L.Ed.2d 169, 86 S.Ct. 1079 (1966). This Court noted that "The degree of the discrimination is irrelevant." ***Harper v. Virginia State Board of Elections***, 383 U.S. at 668, 86 S.Ct. 1082. The Court specifically noted that the poll tax itself was not unconstitutional, it was the denial of the right to vote to the poor that created the impermissible discrimination.

For Mr. Jesus Cantu's case, the prosecution admitted that with at least one of the jurors, Ms. Estella Barrera, their strike "was explicitly based at least partially on her ethnicity." (5th Circuit Order p. 3, Appendix G) In fact the only non-discriminatory matter mentioned by the Fifth Circuit was "her vague and 'fuzzy' answers to the prosecution's questions about her work history." She was struck because she was Hispanic. The State confessed it but the lower courts refuse to condemn it.

It is ironic that the State appellate courts which originally enforced discrimination now recognize most readily the profound harm or taint racial discrimination inflicts. Georgia in ***Rector v. State***, 213 Ga.App. 450, 444 S.E.2d 862 at 865 (1994) found race-based reasons tainted any race-neutral reason and violates ***Batson***. South Carolina also found racial reasons for peremptory strikes tainted any race-neutral explanations. ***Payton v. Kearse***, 329 S.C. 51, 495 S.E.2d 205 at 210 (1998). The Texas Supreme Court also followed suit in ***Powers v. Palacios***, 813 S.W.2d 489 at 491 (Tex. 1991). The lower courts are following ***Powers*** in the civil context. ***Benavides v. American Chrome & Chemical, Inc.***, 893 S.W.2d 624 (Tex.Ct.App. – Corpus Christi, 1994). The State courts recognize that the Constitution prohibits "mixed-motives" as a panacea to remove the unconstitutionality of race

based strikes. See: ***Powers v. Palacios***, 813 S.W.2d 489 at 491 (Tex. 1991); ***State v. Lucas***, 18 P.3d 160 at 163 (2001); ***Payton v. Kearse***, 329 S.C. 51, 495 S.E.2d 205 at 210 (1998); ***Ex Parte Stockwell***, 675 So.2d 38 at 41 (Ala. 1995). The Texas Court of Criminal Appeals has parted with the Texas Supreme Court and adopted the "mixed-motives" basis of allowing discriminatory strikes to stand. SEE: ***Guzman v. State***, 85 S.W.3d 242 (Tex.Crim. App., 1994). The Texas Court of Criminal Appeals is wrong. Discrimination hurts. It hurts physically, emotionally, socially, economically; it debases, degrades, and belittles everyone at which it is directed as well as all who discriminate on the basis of race, ethnicity, gender, or handicaps. This Court has recognized these truths in ***Batson***, ***Powers***, and ***Miller-El***. This Honorable Court should now enforce those holdings. If there were ever an issue which this Court needed to decide, it is whether racism can be tolerated in a free society in any degree.

## CONCLUSION AND PRAYER

This Honorable Court should grant review of the decision of the Fifth Circuit Court of Appeals in New Orleans and reverse the sanctioning of discrimination which is occasioned by the "mixed-motives" exception to ***Batson*** carved out by the lower courts in clear contravention of this Court's jurisprudence in the area.

Accordingly, Petitioner Jesus Cantu respectfully prays that the petition for certiorari to the Fifth Circuit Court of Appeals sitting in New Orleans, Louisiana issue herein

and for such other and further relief to which he may be justly entitled.

Respectfully submitted,

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**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 03-10962
USDC No. 3:02-CV-2002-D

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JESUS CANTU,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
CORRECTIONAL
INSTITUTIONS DIVISION,

Respondent-Appellee.

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Appeal from the United States District Court
for the Northern District of Texas

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(Filed Mar. 10, 2004)

ORDER:

Jesus Cantu, a Texas prisoner (# 851749), moves this court for a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. In 1998, a jury convicted Cantu of possession of more than 50 pounds but less than 200 pounds of marijuana, and it assessed a prison sentence of 20 years and a fine of $10,000.

This court issues a COA to an applicant only if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003) ("The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits."). This court looks to the district court's application of the standards of review set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA") to the petitioner's constitutional claims and asks whether the district court's resolution of those claims was debatable among jurists of reason. *See id.* at 336 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), 341.

In his COA application and brief, Cantu has failed to brief or otherwise raise the following claims that he had set forth in his 28 U.S.C. § 2254 petition: trial counsel performed ineffectively when he failed to object to a jury instruction on joint possession and failed to challenge the validity of search warrants on the ground that they were based on unreliable evidence; the trial court erred in failing to rule on objections to affidavits offered in support of the warrants; and the affidavits offered in support of the warrants were not supported by probable cause. These claims are effectively abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); FED. R. APP. P. 28 (a) (9).

Cantu argues that the judges who presided over his trial and issued search warrants lacked authority to preside in his case because they had not taken or file oaths of office as required by the Texas Constitution. He maintains that the trial court thus was "without jurisdiction" and that his due process rights were violated. Because

violations of state law are not generally cognizable on federal habeas review, *see Bigby v. Cockrell*, 340 F.3d 259, 278 (5th Cir. 2003), Cantu has not made a substantial showing of the denial of a constitutional right as to this claim. It is doubtful that his conclusory assertions that the judges had not taken their oaths would support a claim even under state law. *See Murphy v. State*, 95 S.W.3d 317, 320 (Tex. App. 2002).

Cantu contends that during voir dire the prosecution exercised peremptory strikes in a racially discriminatory manner against three black and two Latino venirepersons, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). As to four of these venirepersons, the prosecution offered race-neutral explanations for its strikes, which Cantu has failed to overcome. *See Purkett v. Elem*, 514 U.S. 765, 768-69 (1995). The prosecution's striking of venireperson Estella Barrera, however, was explicitly based at least partially on her ethnicity, but also upon her vague and "fuzzy" answers to the prosecution's questions about her work history. Although neither the Supreme Court nor this court has addressed whether a "mixed motives" of *Batson* claims is proper, a number of other circuits have done so. *See, e.g., Gattis v. Snyder*, 278 F.3d 222, 234-35 (3d Cir.), *cert. denied*, 537 U.S. 1049 (2002); *Weaver v. Bowersox*, 241 F.3d 1024, 1032 (8th Cir. 2001). Given the uncertain state of the law, Cantu has not established the district court's application of the standard of review in 28 U.S.C. § 2254(d) (1)[1] to the Texas Court of Criminal

[1] Habeas relief may not be granted as to a claim adjudicated on the merits in state court unless the adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal

(Continued on following page)

Appeals' adjudication of his *Batson* claim was "debatable among jurists of reason." *See Miller-El*, 537 U.S. at 336, 341.

Cantu argues that his trial counsel engaged in a conflict of interest, in violation of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), by continuing to represent a codefendant, Adolfo Maldonado, at the time of the trial in 1998. As the state appellate court determined that counsel and Maldonado had had no contact since early 1995, Cantu has not established that the district court's upholding, under the standards of 28 U.S.C. § 2254(d), of the state appellate court's adjudication of this claim was debatable among jurists of reason. *See Slack*, 537 U.S. at 336, 341.

Cantu maintains that counsel performed ineffectively by: (a) failing to seek out and interview potential witnesses, including his wife and the owner of a warehouse rented by Cantu (in which more than 600 pounds of marijuana were found); (b) failing to pursue the suppression of Cantu's allegedly coerced confession and his consent to the search of one of his homes; (c) failing to challenge the alleged absence of jurisdiction based on presiding judges' failure to take required oaths; and (d) allowing Cantu to testify at trial without proper admonishments. Given that Cantu's testimony at a hearing on his motion for new trial was vague and contradictory with respect to some of these matters, Cantu has not established deficient performance or prejudice as to these

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law, as established by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

claims. *See Strickland v. Washington*, 466 U.S. 668, 689-94 (1984).

Finally, Cantu contends that an alleged "aggregation of errors," including the trial court's admission of certain evidence and its refusal to instruct the jury on a lesser included offense, denied him due process. Individual claims constituting alleged "cumulative error" must involve matters of constitutional dimension. *See Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996). As Cantu has not established that any evidentiary ruling by the trial court amounted to a "denial of fundamental fairness," *see Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998), and has shown no constitutional entitlement to a lesser-included-offense instruction, *see Creel v. Johnson*, 162 F.3d 385, 390 (5th Cir. 1998), he has not made a substantial showing of the denial of a constitutional right as to his claim of an "aggregation of errors."

Cantu's COA application is DENIED.

/s/ Fortunato P. Benavides
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT
JUDGE

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

| | | |
|---|---|---|
| **JESUS CANTU,** | § | |
| **PETITIONER,** | § | |
| | § | |
| **V.** | § | |
| **DOUGLAS DRETKE, DIRECTOR OF TDCJ-CID,** | § | **No. 3:02-CV-2002-D** |
| | § | |
| | § | |
| **RESPONDENT.** | § | |

### CERTIFICATE AS TO APPEALABILITY

(Filed Sep. 23, 2003)

A Notice of Appeal has been filed in the above captioned action in which:

(**X**) the District Court has entered a final order in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254.

( ) the District Court has entered a final order in a proceeding pursuant to 28 U.S.C. § 2255.

Pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), the undersigned Magistrate Judge finds and recommends as follows:

**IFP STATUS:**

( ) the party appealing should be GRANTED leave to proceed *in forma pauperis.*

( ) the party appealing is proceeding *in forma pauperis.*

( ) the party appealing should be DENIED leave to proceed *in forma pauperis* for the following reason(s):

( ) the Court recommends that the District Court certify, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915(a)(3), that the appeal is not taken in good faith;

( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and/or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order filed on ___).

(**X**) the person appealing is not a pauper; he paid the $105.00 filing fee.

**COA:**

( ) a Certificate of Appealability should be GRANTED. (See issues set forth below).

(**X**) a Certificate of Appealability should be DENIED. (See reasons stated below).

**REASONS FOR DENIAL:** For the reasons stated in the Findings, Conclusions and Recommendation of the United States Magistrate Judge, filed on June 23, 2003 which were adopted by the District Court on August 7, 2003, the Petitioner has failed to demonstrate that reasonable jurists would find the district court's assessment of the

constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000).

**DATE:** Sept. 19, 2003 /s/ Paul Stickney
**UNITED STATES MAGISTRATE JUDGE**

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**ORDER OF THE COURT ON THE FOREGOING RECOMMENDATION**

Considering the record in this case and the above recommendation, and pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253 (c), the Court hereby finds and orders:

**IFP STATUS:**

( ) the party appealing is GRANTED *in forma pauperis* status on appeal.

( ) the party appealing is proceeding *in forma pauperis.*

( ) the party appealing is DENIED *in forma pauperis* status on appeal for the following reasons:

( ) the Court certifies, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915(a)(3), that the appeal is not taken in good faith. In support of this finding, the Court adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation entered in this case on ___. Based upon the Magistrate Judge's findings, this Court finds that the appeal presents no legal points of arguable

merit and is therefore frivolous. *See Harkins v. Roberts,* 935 F. Supp. 871, 873 (S.D. Miss. 1996) (citing *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983)).

( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and/or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order filed on ___).

(**X**) the person appealing is not a pauper; he paid the $105.00 filing fee.

**COA:**

( ) a Certificate of Appealability is GRANTED on the following issues: ___.

(**X**) a Certificate of Appealability is DENIED. The Court hereby adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation entered in this case on June 23, 2003 in support of its finding that Petitioner has failed to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S., 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000).

**DATE:** September 23, 2003

/s/ Sidney A. Fitzwater
**UNITED STATES**
**DISTRICT JUDGE**

## APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

| | | |
|---|---|---|
| JESUS CANTU,<br>Petitioner,<br><br>V.<br><br>JANIE COCKRELL, Director,<br>Texas Department of Criminal<br>Justice, Institutional Division,<br>Respondent.<br><br>JESUS CANTU,<br>Petitioner,<br><br>v.<br><br>IMMIGRATION AND<br>NATURALIZATION SERVICE,<br>Respondent. | ) | No. 3:02-CV-2002-D |

## FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Jun. 23, 2003)

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of Title 28, United States Code, Section 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions and Recommendation of the United States Magistrate Judge follow:

## FINDINGS AND CONCLUSIONS

Jesus Cantu ("Cantu" or "Petitioner") filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He initiated this proceeding while he was an inmate in the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"). Respondent, Janie Cockrell, is Director of TDCJ-ID. Petitioner is now in the custody of the Immigration and Naturalization Service (INS), pending his deportation. Petitioner sought leave to make the INS a nominal party to this proceeding and requested the Court to stay his deportation during consideration of his § 2254 petition. The Court granted leave and stayed Petitioner's deportation until the District Court enters judgment in this proceeding.

### Procedural Background

A jury convicted Petitioner of possession of marijuana weighing over 50 pounds, but less than 2000 pounds. *State v. Cantu,* No. 0572256D (Crim. Dist. Court No. 4 of Tarrant County, Tex. Nov. 13, 1998). Petitioner was sentenced to twenty years in the custody of TDCJ-ID. (*Id.*) He was also fined. (*Id.*)

Petitioner sought a new trial. After a hearing, the trial court denied his motion for new trial. Petitioner appealed. The Second Court of Appeals affirmed Petitioner's conviction. *Cantu v. State,* No. 02-98-591-CR (Tex. App. – Fort Worth, 2000, pet. ref'd). The Texas Court of Criminal Appeals refused Petitioner's request for discretionary review. *Cantu v. State,* No. 00-1993 (Tex. Crim. App. 2001). Petitioner then filed an application for a writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. 11.07. *Ex parte Cantu,* No. 52,780-01 (Tex. Crim App. Aug. 14, 2002). The

Texas Court of Criminal Appeals denied the petition without written order. *Id.* at cover. Petitioner filed his petition for a writ of habeas corpus in this Court on August 16, 2002.

**Exhaustion of State Court Remedies**

Respondent believes that Petitioner has sufficiently exhausted available state court remedies and does not seek the petition's dismissal on this ground.

**Request for Discovery and to Expand the Record**

Petitioner has requested that he be allowed to conduct discovery. Rule 6(b), Rules Governing Section 2254 Cases in the United States District Courts, provides that requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents sought to be produced. Petitioner's request for discovery does not comply with this rule. Moreover, the Court finds that Petitioner has not shown good cause for discovery. The record is sufficient to decide Petitioner's claims. Accordingly, Petitioner's request for discovery is denied. Petitioner has not stated what materials he wishes to include to expand the record. Accordingly, his request to expand the record is denied as well.

**Request for Evidentiary Hearing.**

Petitioner has requested an evidentiary hearing. The terms of 28 U.S.C. § 2254(e)(2) delineate the circumstances under which a petitioner is entitled to an evidentiary hearing in a federal habeas corpus proceeding:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Petitioner has not met this standard. Accordingly, his request for an evidentiary hearing is denied.

## Petitioner's Claims

In fourteen claims for relief, Petitioner raises the following issues:

(1.) Various state officials failed to take and file their oaths of office as required by state law, thus making their actions void;

(2.) His trial counsel had an actual conflict of interest;

(3.) He received constitutionally ineffective assistance of counsel at trial because:

(a) trial counsel failed to discover that judges and an officer had failed to take and file the required oaths of office;

(b) he failed to seek out and interview potential witnesses;

(c) he failed to raise Fourth Amendment issues before trial;

(d) the totality of counsel's representation fell below any standard of reasonableness;

(4.) Petitioner received constitutionally ineffective assistance of appellate counsel because:

(a) counsel failed to challenge the trial judge's authority in his motion for new trial;

(b) counsel failed to raise the trial judge's failure to file the oath of office as a claim on direct appeal;

(5.) The trial court erred in a number of particulars, denying Petitioner the right to a fair trial;

(6.) Petitioner was denied an impartial jury because the prosecution struck all minority members;

(7.) The affidavits to support the arrest and search warrants were not based on the requisite probable cause, and counsel should have challenged their validity; and

(8.) The entire trial was so overwrought with the lack of credible testimony, effective counsel, improper juror selection, and sufficiently corroborated evidence, that Petitioner was

denied due process and did not receive a fair and impartial trial.

## Statement of Facts

Officer Michael Kennedy ("Kennedy"), a member of the Tarrant County Drug Task Force, suspected in September 1994 that Cantu and Adolfo Maldonado were distributing marijuana. (III SF at 26.) Kennedy learned that Cantu lived at 1210 Lee Avenue in Fort Worth, Texas; he also found out that Cantu leased a warehouse at 700 N. Throckmorton in Fort Worth. (III SF at 26-27.) Kennedy began a program of close surveillance, in person, and with a video camera the police had installed in their headquarters in downtown Fort Worth.[1] (III SF at 37.)

Kennedy observed that although Cantu frequently visited the warehouse by himself, it did not appear that any sort of legitimate business was being conducted in the warehouse. (III SF at 42.) He did not see employees or anyone else conducting daily work activities there. (*Id.*) In fact, Kennedy never observed anyone enter the warehouse unless Cantu let them in. (III SF at 43.) The warehouse had a walk-in-door on the south side of the building and an overhead bay door on the North side. (*Id.*) He never observed anyone park in the lot outside the warehouse. (III SF at 45.) Instead, when Cantu had a visitor, the

[1] The Fort Worth Police Department building was less than half a mile from the warehouse. The police were able to zoom in on activities at the warehouse with a video camera due to (1) the difference in elevation between the building and the warehouse, (2) their observation point on the building's third floor and (3) a high-powered lens with day and night vision. (III SF at 37.)

driver would pull his vehicle completely inside the warehouse, and someone inside would close the doors. (*Id.*)

On one night in early November, Kennedy observed Cantu leave the warehouse and look around in all directions. (III SF at 47.) Then someone drove a vehicle out of the warehouse with its lights off, went half a block, turned on the headlights, dashed out onto Main Street, and drove away. (*Id.*)

On another night in early November, the police tracked Maldonado to the warehouse.[2] They saw Maldonado meet Cantu and drive into the warehouse. (III SF at 35-36.) Later, they saw Maldonado leave. Within a minute or two of Maldonado's departure, Cantu drove out of the warehouse in his four-door dually, got out and secured the door, and drove away. (*Id.*) Kennedy then followed Cantu to his home where he saw Cantu park in the driveway, take a cardboard box out of his pickup truck and disappear toward the rear of the house. (*Id.*)

Officers obtained a warrant and searched the warehouse when Cantu was not present. (III SF at 51.) Kennedy noticed an "overwhelming odor of bulk marijuana," which was strongest in the vicinity of a large vault. (III SF at 62, 64.) The vault contained two large deep freezers that had a number of boxes stacked on them. (III SF at 65.) The boxes contained large compressed bulk bales of marijuana. (III SF at 71.) The freezers, which were operating, were "filled to capacity with large compressed bulk bundles of marijuana." (III SF at 71, 72.) The marijuana

[2] The police tracked Maldonado by using the police helicopter. (III SF at 32.)

weighed approximately six hundred pounds. (III SF at 72.) The vault contained a total of eighty-three blocks of marijuana. (IV SF at 15.)

The officers also found wrapping materials that contained marijuana residue and the type of scales that are used to weigh marijuana. (III SF at 76, 70-71.) A fingerprint, later identified as Cantu's, was discovered on a strip of tape from one of the blocks of marijuana. (IV SF at 128.) Police also discovered a drivers license bearing (1) the name Arturo Lopez, (2) Petitioner's photograph and (3) his thumb print. (IV SF at 167, St's Ex. 110.) The license was ostensibly issued by the Republic of Honduras. (Id.) The officers found two firearms in a truck that contained a hidden compartment which was capable of concealing contraband. (III SF at 77-80.) At least one of the weapons was loaded. (*Id.*) The officers also found a Sears sales receipt showing that Cantu purchased the freezers on November 21, 1994, nine days before the search warrants were executed. (III SF at 74.)

Kennedy obtained a warrant to search Cantu's house at 1210 Lee Street. (III SF at 80-82.) Kennedy and some other officers entered Cantu's house at 10:00 P.M., after they had searched the warehouse. (III SF at 90-91.) An officer gave Cantu his Miranda warnings. (III SF at 90-91.) Officers found about $15,000 in cash behind a loose door frame in Cantu's residence. (III SF at 95.)

Cantu owned a second house, directly behind the house on Lee. (III SF at 115-16.) Cantu consented in writing to Kennedy's request to search the second house, which was at 1207 Clinton. (III SF at 116-17.) Cantu showed the officers an underground room which contained scales, three safes, a bag of wrappers for wrapping bundles

of money, and some marijuana stems and seeds. (III SF at 113-128.) When Cantu opened the safes, the officers found a total of $579,010. in them. (III SF at 126.) Cantu cooperated with Kennedy, revealing the overall mechanics of the marijuana operation and his business partnership with Maldonado in the distribution venture.[3] (IV SF at 187-88.)

Kennedy did not take Cantu into custody immediately after the search of his houses. (III SF at 128; IV SF at 187-99.) The next day Kennedy was studying papers he had recovered from Cantu[4] when he discovered Cantu had

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[3] This testimony was permitted after Cantu had testified at trial. Cantu denied that he told Kennedy about the marijuana operation and denied making an oral confession. (IV SF at 136.) He testified that when the police executed the warrant at night, they broke into his house wearing black masks and pointed guns to the heads of his wife and fourteen-year-old daughter. (IV SF 138.) He admitted that shortly after that, the police holstered their guns. (IV SF at 139.) Kennedy asked Cantu if he could talk to him, and he answered, "Yes." As Cantu related, "[Cantu] did not have a problem with that." Cantu admitted at trial that he signed the consent paper and willingly took Kennedy to the other house where the money was found. (IV SF at 141.) Cantu testified that his wire transfers of money to Florentino Garcia in Mexico were for "table tops." Cantu told the jury that he went to Mexico on November 18, 1994, and returned on November 28, 1994. (IV SF at 143.) He claimed he gave Maldonado the keys to the warehouse and vault to do some repair work on his dump truck while Cantu was gone. (IV SF at 142.) Cantu said he was never in the vault handling marijuana. (IV SF at 148.) He denied that he kept scales in the secret underground room where he hid money. (IV SF at 181.) Nevertheless, the scales were found there, and Petitioner had the only key. (*Id.*) Cantu also claimed he had never seen the gun that police found in his truck. (IV SF at 184.)

[4] The government introduced evidence of money transfers from Cantu to Florentino Garcia in Mexico. (IV SF at 106-07.) A money transfer was made in the amount of $5,153.25 on November 30, 1994, the date police executed the search warrant on the warehouse. (IV SF at 108.)

rented a mini-warehouse at 1850 Ephriham. (III SF at 129-36.) Kennedy questioned Cantu about the mini-warehouse that day. (III SF at 30.) The next morning, Kennedy went to the mini-warehouse and saw Cantu sitting in a van nearby. (III SF at 133 .) Cantu drove away when he saw Kennedy. (III SF at 133.) When Kennedy followed Cantu and stopped him, he gave written permission for Kennedy to search the mini-warehouse. (III SF at 134.) Among other items, Kennedy found two large diesel gas tanks with hidden compartments in them. (III SF at 136.) Cantu told Kennedy he was there to pick up the tanks so that he could sell them to a narcotics trafficker to raise cash because the officers had seized all of his money in the raid. (III SF at 137.)

## Standard of Review

The pertinent terms of the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), 28 U.S.C. § 2254 provide:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the

> facts in light of the evidence presented in a State court proceeding.

28 U.S.C. § 2254(d). Under the "contrary to" clause, a federal court considering a habeas corpus petition may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 380-84 (2000). Under the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.*

Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. The petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Hill v. Johnson,* 210 F.3d 481, 485 (5th Cir. 2000). When the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written order, it is an adjudication on the merits. *Singleton v. Johnson,* 178 F.3d 381, 384 (5th Cir. 1999).

## Analysis

### (1.) Petitioner's Claims Regarding Various State Officials' Oaths of Office

Petitioner claims that various state officials had failed to file their oaths of office before they performed their duties in connection with Petitioner's criminal case. More specifically, Petitioner claims that (1) the trial court lacked

subject matter jurisdiction and denied him due process because the judge had not taken or filed the oaths of office that are required by the Texas Constitution, and (2) the search warrants were invalid because the state court judge who issued them had not filed the oaths of office required by state law. Petitioner also claims that the police officer who executed the affidavit for the search warrant issued for Petitioner's property had not filed the required oath of office.

Petitioner's claims with respect to failure to file required oaths of office are based entirely upon state law. (Pet. Brief at 11-12, 14.) Petitioner does not state a federal constitutional claim. Except in cases where a petitioner is claiming actual bias against the defendant by a state tribunal or that the judge had an interest in the outcome of the case, questions concerning the qualification of a judge to hear a case are not constitutional ones. *Aetna Life Ins. Co. v. Lavois,* 475 U.S. 813, 828 (1986). Such questions are answered by common law, statute, or the professional standards of the bench and bar.[5] *See, e.g., Aetana,* 475 U.S. at 820-821; *Tuney v. Ohio,* 273 U.S. 510, 523 (1927). Moreover, an error under state law does not provide grounds for habeas relief. *Engle v. Isaac,* 456 U.S. 107, 119

[5] The Texas Constitution requires that all elected and appointed officers of the State, before taking the oath of office, shall swear or affirm that they have not paid or promised any money or thing of value or promised public office or employment to sure votes or an appointment (the "anti-bribery oath"). Each officer must also take the oath of office, in which the officer swears to faithfully execute his or her duties and preserve, protect, and defend the Constitutions of the United States and of Texas. Tex. Const. art. XVI, § 1. Petitioner has presented no proof that the judges in question did not take the required oaths of office.

(1982). Petitioner's claims that he is entitled to habeas corpus relief based upon state judges' or an officer's failure to file required oaths of office are not cognizable on federal habeas corpus review.

Although Petitioner fails to cite any federal law in support of this claim, he might be attempting to raise a federal due process claim. Petitioner claims that because the oaths were not on file with the Texas Secretary of State, the officials did not take the required oaths. This claim is without merit. Texas courts have routinely held that the absence of a record on file with the Secretary of State does not establish that the oaths were not taken. Further, "most importantly, simply failing to file an oath that has been taken does not deprive the official of his authority." *Thomas v. Burkhalter,* 90 S.W.3d 425, 427 (Tex. App. – Amarillo 2002, writ ref'd) (citing *Soderman v. State,* 915 S.W.2d 605, 611-12 (Tex. App. – Houston [14th Dist.] 1996, writ ref'd); *see also, Murphy v. State,* 95 S.W.3d 317, 320 n. 3 (Tex. App. – Houston [1st Dist.] 2002) (finding that "a lack of filing of any required oath is not proof, in itself, of the failure of the judge to take the constitutionally required oaths"). Petitioner has failed to show that the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court. Further, he has not shown that they resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Petitioner is not entitled to habeas corpus relief based upon these claims.

**(2.) Petitioner's Claim that Trial Counsel had a Conflict of Interest**

Petitioner claims that his trial counsel had an actual conflict of interest because he represented both Petitioner and Maldonado.[6] He claims counsel's representation "denied [him] due process[7] and effective assistance of counsel." When a claim of ineffective assistance of counsel is based on an alleged conflict of interest, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance – thereby rendering the verdict unreliable. *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980)). *See Mickens v. Taylor,* 535 U.S.162, 122 S. Ct. 1237, 1244 and n.5 (2002). If a defendant shows that his attorney's conflict of interest actually affected the adequacy of his representation, he need not demonstrate prejudice before he may obtain relief. *Sullivan,* 446 U.S. at 349-350.

Petitioner first raised his conflict of interest claim in his motion for new trial. After a hearing, the trial court denied the motion. (Clerk's Record, Vol. I at 165.) Petitioner claimed on appeal, as he had in his motion for new trial, that trial counsel's loyalty to Maldonado kept him

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[6] Petitioner refers to Maldonado in this habeas corpus proceeding as the "co-defendant." Maldonado was never a co-defendant in the State's criminal case against Petitioner. (I SF at 3-6.) However, Maldonado's and Cantu's criminal charges in separate cases arose from the same criminal episode and involved similar facts. Maldonado was charged with possession of marijuana the police found inside his house. (IX SF at 168.)

[7] If a trial counsel's basic strategic decisions were influenced by the interests of another then the defendant's due process rights were not respected. *See Wood v. Georgia,* 450 U.S. 261, 272 (1981).

from calling as a witness Bob Mitchell, the owner of the warehouse where the marijuana was found. Mitchell would have testified that he had seen Maldonado driving his white truck in the vicinity of the warehouse around Thanksgiving in 1994. Petitioner claimed this would have bolstered his own testimony that Maldonado had the exclusive use of the warehouse while Petitioner was out of town and that Maldonado must have put the marijuana in the warehouse. Petitioner also claimed counsel's loyalty to Maldonado kept him from adequately investigating the case.

The appellate court considered the entire record, including the evidence adduced at the hearing on the motion for new trial. The appellate court concluded that trial counsel's early 1995 contacts with Maldonado were very limited and remote in time from Petitioner's November 1998 trial.[8] It found that Petitioner had failed to show that trial counsel actively represented conflicting interests at trial.[9]

The state appellate court also held that Petitioner had failed to prove that a conflict of interest kept trial counsel from advancing the defense of shifting the blame to

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[8] Voir dire commenced on November 10, 1998. (II SF at title page.)

[9] Petitioner initially argued that trial counsel engaged in multiple representation. He changed his argument later and claimed it was successive representation. The state appellate court found that Petitioner did not prove an actual conflict that would require reversal, irrespective of whether he was claiming multiple or successive representation. Its decision is not clearly contrary to United States Supreme Court precedent. The United States Supreme Court decided *Sullivan* based upon multiple representation. It has not addressed a case of successive representation in the same context.

Maldonado. It noted that counsel elicited testimony from Petitioner that implicated Maldonado in the crime. He also argued this defense to the jury during his closing argument. It further found that Petitioner had never told counsel about Mitchell's potential testimony The appellate court held that Petitioner had failed to prove that counsel had failed to adequately investigate the case and to contact potential defense witnesses.

This Court has thoroughly reviewed the record to determine whether the state court proceedings resulted in a decision that is (1) contrary to, or an unreasonable application of, United States Supreme Court precedent or (2) based upon an unreasonable determination of the facts according to evidence presented in the state court proceedings. The record shows that Maldonado contacted Petitioner's counsel, Abe Factor, shortly after November 30, 1994, the date the search warrants were executed. (VIII SF at 142.) The initial contact occurred before Maldonado's arrest. (*Id.*) Counsel met with him once or twice, communicating with him through his son because Maldonado was not proficient in English. (IX SF at 69.) On January 3, 1995, a criminal complaint was filed against Maldonado. On January 11, 1995, Petitioner's counsel notified the Clerk of the 371st District Court that he had been retained to represent Maldonado. (X SF at Ex. 23.) Maldonado was indicted on February 23, 1995, for possession of marijuana. (X SF at Ex. 4.)

According to Petitioner, when Maldonado learned Petitioner had been implicated, Maldonado "begged" Petitioner to contact Mr. Factor. (VIII SF at 142.) Petitioner did so, and. Mr. Factor agreed to represent Petitioner. Mr. Factor then (1) contacted Maldonado's son, (2) told him he could not represent Maldonado and (3) gave

him the name of another attorney who would represent Maldonado. (IX SF at 67.) Petitioner's counsel contacted the other attorney and sent Maldonado's retainer to him. (*Id.*) The record shows no further contacts between Mr. Factor and Maldonado.

On February 1, 1995, Mr. Factor notified the Clerk of Criminal District Court Number Four that he had been retained to represent Petitioner. (D's Ex. 26, Vol. X.) Petitioner's counsel testified that (1) his last contact with Maldonado was at their second interview and (2) Maldonado fled in early 1995. (IX SF at 70, 113.) On September 29, 1995, counsel wrote a letter to the District Attorney stating he no longer represented Maldonado. (D's Ex. 37.) The record does not show that counsel withdrew from Maldonado's case. Nevertheless, it is clear from the record that Petitioner's counsel never actively represented Maldonado after that second interview.[10]

Other testimony established that Maldonado jumped bond in 1995. His bond was forfeited, and an arrest warrant issued for him on April 20, 1995. Maldonado was still missing on January 19, 1999, when the hearing convened on Petitioner's motion for new trial. (IX SF at 118.) Mr. Factor explained that he chose to represent Petitioner because his English was much better than Maldonado's.

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[10] Mr. Factor may have breached a duty to the trial court in which he entered an appearance for Maldonado by not withdrawing from the case. He also may have breached a duty to Maldonado, but breach of an ethical standard does not necessarily prove a denial of the Sixth Amendment guarantee of assistance of counsel. *See Nix v. Whiteside*, 475 U.S. 157, 165 (1986). Instead, the Court must focus on whether the record shows that counsel was influenced in his basic strategic decisions by Maldonado's interests.

(*Id.* at 69.) He indicated that he had explained the conflict to Petitioner. (*Id.*)

Petitioner did not raise the alleged conflict at trial. He must therefore establish that an actual conflict existed that adversely affected his counsel's performance – as opposed to a mere theoretical division of loyalties. *Sullivan,* 446 U.S. at 349-50. Petitioner relies upon counsel's failure to call the warehouse owner, Mitchell, as a witness. He claims that around Thanksgiving of 1994, Mitchell saw Maldonado in his white truck pulling a grain-type trailer about two blocks from the warehouse and learned that Maldonado was taking the trailer to the warehouse for repairs. (IX SF at 99-104.) Mr. Factor testified that if Petitioner had told him about Mitchell in time to subpoena him for the trial, he would have called Mitchell to testify. (IX SF at 73-74, 80, 82.)

At every stage of the trial, counsel actively pursued Petitioner's defense that Maldonado put the drugs in the warehouse while Petitioner was in Mexico. (III SF at 18-20, IV SF at 137-138, V SF at 14-15.) Counsel elicited testimony from Petitioner that he did not know about the drugs and that Maldonado was the only one with a key to the vault in the warehouse when the drugs were found there. (IV SF at 151.) Petitioner also testified that he was in Mexico from November 18, 1994, until November 28, 1994.[11] (IV SF at 137-138.)

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[11] The jury may not have believed Petitioner because the State proved he bought a freezer at Sears on November 21, 1994. (IV SF at 143, 153-154.)

The state appellate court held that Petitioner did not show that counsel's failure to call Mitchell affected the adequacy of his representation. This Court agrees. Mitchell was vague about the date he saw Maldonado driving the white truck. (IX SF at 99.) Moreover, the missing testimony would not have proved that Petitioner was gone at the time the marijuana was put in the warehouse, or that he did not know about the marijuana found in two freezers he had purchased. Additionally, it would not have explained his fingerprint on the tape from a bundle of marijuana, his fake Honduran drivers license found at the scene and the half million dollars hidden in a secret underground room. The hidden room contained scales, money wrappers, marijuana seeds and stems. Even assuming that the Mitchell testimony had been crucial to Petitioner's defense, Petitioner has not shown that counsel knew that Mitchell's testimony was important and chose not to call Mitchell. Petitioner testified he did not tell counsel about Mitchell because counsel never allowed him to talk. (VIII SF at 156.) Counsel testified he would have paid attention if Petitioner had told him about Mitchell's having seen Maldonado with a large trailer. (IV SF at 115.) Finally, Petitioner has not shown that counsel's failure to call Mitchell was influenced by counsel's representation of, or duty of loyalty to, Maldonado. (IX SF at 118-19.) The appellate court held that Petitioner failed to show that counsel's alleged conflict of interest denied him due process or deprived him of his Sixth Amendment right to the effective assistance of counsel. Petitioner's PDR was refused. The state court decision to deny relief was not clearly contrary to, nor an unreasonable application of, United States Supreme Court precedent. It was not based upon an unreasonable determination of the facts in light of the evidence in the state court proceeding.

Similarly, Petitioner failed to prove his claim that due to the purported conflict of interest, trial counsel failed to adequately investigate the facts and interview potential witnesses. Counsel testified that he discussed with Petitioner who to call as witnesses and told him he would have to have the witnesses' names and addresses to get subpoenas issued. (IX SF at 82.) He testified that if Petitioner had told him about Mitchell, he would have subpoenaed him. (*Id.*) Counsel represented Petitioner in a civil forfeiture action which provided an opportunity for discovery in the criminal case. Pursuant to the Tarrant County District Attorney's open file policy, counsel reviewed all of the available information. Counsel testified that the week of the trial he met with Petitioner several times to discuss the case. (IX SF at 111.) With respect to Petitioner's claim that his wife should have testified, Counsel testified Petitioner didn't want his wife there for the trial. (*Id.*) Counsel asked him to have her there for the punishment phase. (*Id.*) The state appellate court held counsel's failure to call Petitioner's wife to testify at the guilt or innocense stage of the trial was not an effort to protect Maldonado. This decision is supported by the record.

Counsel put on a vigorous defense and exhibited a firm grasp of the facts throughout the proceedings. He filed numerous pretrial motions, an application for probation, requested additions to the Court's jury charge, and sought an instructed verdict. After the conviction, Counsel presented testimony and argued for probation. The record simply does not show that because of counsel's representation of Maldonado, he failed to investigate the facts and refused to call witnesses in Petitioner's defense. Petitioner failed to make the requisite showing for the court to grant relief on this claim.

### (3.) Petitioner's Ineffective Assistance of Trial Counsel Claims

Petitioner asserts in a number of other claims that both trial and appellate counsel provided constitutionally ineffective assistance. The state courts found against Petitioner on these claims, correctly recognizing that the merits of the ineffective assistance of counsel claims were squarely governed by the United States Supreme Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984).[12] Under Strickland, Petitioner is required to prove that: (1)

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[12] Petitioner argues that his ineffective assistance of counsel claims should be analyzed under *United States v. Cronic*, 466 U.S. 648 (1994), rather than *Strickland*. The *Cronic* standard relieves a defendant of demonstrating the second prong of *Strickland*, i.e., "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Under *Chronic*, prejudice is presumed. *See Cronic*, 466 U.S. at 658-659.

The *Cronic* standard is reserved for extraordinary circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 695. *Cronic* applies (1) when the assistance of counsel has been denied entirely or during a critical stage of the proceeding, (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and (3) when counsel is called upon to render assistance under circumstances where competent counsel very likely could not render such assistance. *Cronic*, 466 U.S. at 695-696. For example, this Court would have presumed prejudice with respect to Petitioner's conflict of interest claim if he had met the threshold showing of a conflict of interest that adversely affected counsel's performance.

In this case, however, Petitioner argues that all of his ineffective assistance of counsel claims should be examined under the *Cronic* standard because counsel's mistakes were so numerous and egregious that the trial was unfair. (Pet. Brief at 2-21.) This Court has reviewed the entire record and the briefs of the parties. The Court is convinced that Petitioner's counsel subjected the prosecution's case to meaning adversarial testing. The Court therefore finds that the state courts were correct in applying the *Strickland* standard.

counsel's performance was deficient and (2) the deficient performance prejudiced the defense so gravely as to deprive Petitioner of a fair trial. *Id.* at 687. In *Strickland,* the Court stated that "[j]udicial scrutiny of counsel's performance must be highly deferential" and that "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland,* 466 U.S. at 689. Therefore, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

To prove prejudice, a petitioner must show "a reasonable probability that the result of the proceedings would have been different but for counsel's unprofessional errors." *Strickland,* 466 U.S. at 694. A petitioner is only entitled to federal habeas corpus relief if the state court decisions rejecting his ineffective-assistance claims were either "contrary to, or involved an unreasonable application of," the United States Supreme Court's decision in *Stickland.*

The Court will now discuss each of Petitioner's claims that his counsel provided constitutionally ineffective assistance.

### (3a.) Petitioner's Claims That Counsel Provided Ineffective Assistance for Failing to Discover That Judges and an Officer Failed to File Required Oaths of Office

Under the Texas Constitution, a judge is required to take two oaths of office. *See* Tex. Const. art. XVI, § 1.[13] Petitioner argues that the trial judge, Howard Fender, did not take the required oaths before he presided over the trial. Petitioner states that the judge's actions were therefore void. He argues his trial counsel was ineffective because counsel permitted Petitioner to be tried in a court where the presiding judge had no jurisdiction.

As proof that the trial judge failed to take and file his oaths of office, Petitioner attaches a certification from the Texas Secretary of State. The certification states that a search of state records shows that Judge Fender filed his oaths of office on July 14, 2000. (Pet. Ex. 1). Petitioner argues that because the trial was conducted in 1998, Judge Fender failed to comply with constitutional requirements.[14]

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[13] The Texas Constitution requires that all elected and appointed officers of the State, before taking the oath of office, shall swear or affirm that they have not paid or promised any money or thing of value or promised public office or employment to assure votes or an appointment (the "anti-bribery oath"). Each officer must also take the oath of office, in which the officer swears to faithfully execute his or her duties and preserve, protect, and defend the Constitutions of the United States and of Texas. Tex. Const. art. XVI, § 1.

[14] Judge Fender was a retired appellate judge appointed to preside over Petitioner's trial. Neither the Texas Supreme Court, nor the Texas Court of Criminal Appeals, has addressed whether judges under such

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As this Court has previously noted in connection with Petitioner's earlier claims regarding the oaths of office, Texas courts have routinely held that the absence of a record on file with the Secretary of State does not establish that the oaths were not taken and simply failing to file an oath does not deprive the official of his authority. *Thomas,* 90 S.W.3d at 427 (citing *Soderman,* 915 S.W.2d at 611-12). *See also, Murphy,* 95 S.W.3d at 320 n.3. In this case, Petitioner has failed to show that Judge Fender did not take the oaths of office before he presided over Petitioner's trial.

Petitioner states that Judge Sharon Wilson signed the search warrant authorizing a search of Petitioner's home and storage building. (State's Trial Exhibit 37.) Judge Wilson signed the search warrant on November 30, 1994. (*Id.*) Petitioner argues, however, that Judge Wilson did not file her oaths of office until December 1[illegible], 1994. (Pet. Ex. 1). Petitioner argues that the search warrant was void and that trial counsel was ineffective for not raising this issue. As discussed previously, an official's failure to timely file an oath of office with the Secretary of State does not establish that the oath was not taken. Petitioner has not shown that Judge Wilson was without authority to act or that her actions were void.

Petitioner states that the search warrant issued for Petitioner's property was supported by Kennedy's affidavit. Petitioner argues that Kennedy failed to file the

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an appointment must take the oaths of office. One state appellate court has addressed the issue and has determined that such judges are required to take the oaths. *See Prieto Bail Bonds v. State,* 994 S.W.2d 316, 321 (Tex.App. – El Paso 1999, pet. ref'd).

required oath of office. Kennedy signed the search warrant affidavit on November 30, 1994. (Tr. Ex. 38.) Petitioner attaches a certification from the Texas Secretary of State stating that Kennedy filed oaths of office on September 5, 1996, and September 9, 1996. Petitioner argues that his counsel was ineffective for failing to object to the search warrant based on Kennedy's failure to file the oath of office. As discussed in connection with Petitioner's other similar claims, an official's failure to timely file an oath of office with the Secretary of State does not establish that the oath was not taken.

The Court has determined that Petitioner's claims with respect to various state officials' having failed to file the required oaths of office raise, at most, state procedural issues and not federal constitutional claims. Petitioner failed to show the officials lacked authority to perform their duties. He failed to show that his objections had merit. Counsel's failure to raise meritless objections is not ineffectiveness of counsel; it is the very opposite. *See Clark v. Collins,* 19 F.3d 959, 966 (5th Cir. 1994). Moreover, Petitioner failed to show that he was prejudiced. More importantly, Petitioner has not shown that the state court decisions to deny habeas relief on this ground are contrary to, or involved and unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. He has not shown such a denial resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Petitioner's claims of ineffective assistance of counsel based upon counsel's failure to raise the oath issues should therefore be denied.

**(3b.) Petitioner's Claims That Counsel Failed to Seek Out and Interview Potential Witnesses**

Courts are reluctant to find ineffective assistance based upon complaints regarding uncalled witnesses. *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985). Whether or not to present a particular witness's testimony is essentially trial strategy and within trial counsel's domain. *Id.* Moreover, predictions of uncalled witnesses' testimony are largely speculative. *See McCoy v. Cabana,* 794 F.2d 177, 183 (5th Cir. 1986). Counsel's actions are usually based, quite properly, on information supplied by the defendant. Whether an investigation decision is reasonable depends critically on such information. *Strickland,* 466 U.S. at 691.

Petitioner claims counsel provided ineffective assistance by failing to investigate and call as witnesses Mitchell, the owner of the warehouse, and Petitioner's wife. The state appellate court thoroughly reviewed Petitioner's claims of counsel's failure to investigate the facts of the case and call witnesses. It noted that counsel met with Petitioner as many as, or more than, fifty times and that he independently reviewed the materials in the prosecutor's files. *Cantu v. State,* Slip Op. No. 02-98-591-CR at 10. It also noted that Petitioner did not relay much of the information he now complains about to counsel, allegedly because Counsel "never allowed [him] to talk." *Id.* at 10. The appellate court also found that counsel examined the affidavits and the prosecutor's files in the forfeiture and the criminal case. *Id.* at 11. It found that the testimony at the motion for new trial hearing did not establish counsel should have known of these witnesses or that they possessed favorable information. *Id.* at 11.

Petitioner has not shown that the state court's decision was clearly contrary to *Strickland* or an unreasonable determination of the facts. Petitioner admits he met with his counsel " . . . 50 or more, more than 50 times." (VIII SF at 144). Counsel discussed with Petitioner the witnesses he wanted to call and explained that he would need to furnish their names and addresses. (IX SF at 82.) Petitioner indicated he didn't want his wife to attend the trial and counsel asked him to bring her for the punishment phase. (IX SF at 112.) Additionally, neither Petitioner's wife's testimony, nor that of Mitchell would have called into question Kennedy's testimony about the events of November 30, 1994. Mitchell could have testified that he saw Maldonado driving toward the warehouse "around Thanksgiving." Petitioner's wife could have testified that she and Petitioner were in Mexico from November 22 or 23, 1994, to November 28, 1994. (VIII SF at 20.) Further, Petitioner's wife could have testified that she and Petitioner returned from Mexico on November 28, 1994, and that they went to the warehouse that evening. (*Id.*). Petitioner argues that his wife would have testified that Petitioner was at home during the day on November 29, 1994. (Pet. Brief at 17.) His activities on November 29, 1994, were not in question.

Kennedy testified that on November 30, 1994, surveillance showed that an "eighteen-wheeler" pulled into the warehouse. (III SF at 167, 191) Kennedy said that Petitioner followed it in his own truck, and that he saw Petitioner leave the warehouse later on November 30, 1994. (*Id.*). Officers executed a search warrant that evening, and found approximately 600 pounds of marijuana in the warehouse. (III SF at 56, 72) Later that same evening,

police officers confronted Petitioner at his house and searched it and the house on Clinton. (III SF at 81, 88)

Petitioner claims Mitchell's and his wife's testimony could have substantiated his account that he was in Mexico until November 28, 1994. Petitioner does not claim that Mitchell or Petitioner's wife could vouch for his activities on November 30, 1994, the date the marijuana was found. On this date, Kennedy saw an eighteen-wheeler enter the warehouse with Petitioner following in his truck. Petitioner failed to show that, but for counsel's failure to interview and call Mitchell and Petitioner's wife as witnesses, the results of the proceeding would have been different. This claim does not warrant habeas corpus relief.

Petitioner also argues his counsel was ineffective for not interviewing neighbors who would have testified on his behalf. Petitioner states their testimony would have raised credibility issues regarding Kennedy's testimony that "there was a gate[15] leading [from his residence at 1210 Lee

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[15] Kennedy testified regarding what was depicted in photographs that had been admitted into evidence. (III SF at 110.) He testified that when he arrived at 1210 Lee Avenue, he had to climb over a fence. (*Id.* at 108-09) The trial court admitted into evidence a photograph of the home and fence. (*Id.* at 109) Kennedy testified there was a driveway, and a gate led up to the walk to the front porch. He pointed these out on the photograph in the presence of the jury. (*Id.* at 110) Kennedy testified that there was an alleyway behind the residence at 1210 Lee Avenue and that another residence backed up to the residence. (*Id.* at 111.) He further testified that the second residence, located at 1207 Clinton, looked similar to the 1210 Lee Avenue residence because both residences had almost identical fence work and ironwork. (*Id.* at 111-12.) He stated that he checked tax records and determined that Petitioner also owned the residence at 1207 Clinton. (*Id* at 112.) The

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Avenue] into an alleyway [that backed up to the house on Clinton where Petitioner had built a hidden underground room].[16] (Pet. Brief at 17, citing to III SF at 111-12.) In support of this claim, Petitioner submits the affidavit of a private investigator, Walter Weiss, who states that he spoke with neighbors Angel Celis, Francisco Arebalo and Fidel Olvera. Weiss states that each of these neighbors informed him that there was never a gate opening onto the alley from 1210 Lee Street. (Pet. Brief at Ex. G.)

To be entitled to habeas relief on a claim of uncalled witnesses, the claim must be supported with proof of (1) the availability of the witnesses to testify or (2) the substance of their missing testimony. *See United States v. Cockrell,* 720 F.2d 1423, 1427 (5th Cir. 1983) (stating that ineffective assistance is not demonstrated if the defendant fails to produce the affidavit of the uncalled witness). Petitioner does not submit affidavits from any neighbors. Weiss' affidavits, with respect to what these witnesses told him, are hearsay. Further, there is no evidence these witnesses were available and willing to testify on short notice in the middle of the trial. None of these witnesses testified during Petitioner's motion for new trial.

Petitioner's claim fails to meet either prong of the *Strickland* test. First, counsel was not deficient for failing

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trial court admitted photographs depicting the 1207 Clinton residence. (*Id.*)

[16] Petitioner also argues neighbors' testimony would have refuted Kennedy's testimony that he conducted surveillance through the alleyway. Petitioner fails to refer the Court to any such testimony in the transcript. Accordingly, the Court will not address that aspect of the argument.

to interview and call the neighbors. The record does not show that Petitioner told counsel about the neighbors after Kennedy's testimony. Counsel would have had to predict what Kennedy would say to have known to call these witnesses. Petitioner fails to point to any information in the search warrant affidavits or elsewhere that would have led counsel to expect Kennedy's testimony. Moreover, Kennedy did not testify he went through a gate. Rather, he testified that Petitioner escorted him through the alleyway to the back door of the house on Clinton. (III SF at 119.)

Secondly, Petitioner fails to show he was prejudiced. At the hearing on the motion for new trial, the prosecution showed that certain boards in the fence between the two houses are attached but have no cross-pieces securing them to the corner post; in other words the loose boards form a makeshift entry. (IX SF at 122-126.) If Petitioner had presented witnesses to testify that there was no gate, cross-examination could have revealed the make-shift entry.

Finally, Petitioner has not shown that the neighbors' testimony would have caused the jury to discredit Kennedy's testimony. How Kennedy and Cantu reached the house on Clinton was incidental and certainly not a necessary element of the prosecution's case.

### (3c.) Counsel's Failure to Raise Fourth Amendment Issues before Trial

Petitioner argues his counsel was ineffective for failing to raise before trial Fourth Amendment issues "specifically related to the affidavits to support search warrants." (Pet. Brief at 40.) Petitioner does not explain this claim. He merely states that the trial court admonished counsel that

fourth amendment issues should have been raised before trial. (*Id.*) However, in his reply, Petitioner reveals his reasoning. He states that counsel should have objected before trial that the officer failed to file the oath of office and therefore the warrants were invalid. As the Court has stated, failure to file the oath of office is not evidence the oath was not taken. Petitioner failed to show deficient performance and prejudice with respect to this claim.

**(3d.) <u>The Totality of Counsel's Representation Fell Below Any Standard of Reasonableness</u>**

Petitioner sets forth a litany of claims in support of his argument that the totality of counsel's representation fell below any standard of reasonableness. Petitioner faults counsel for failing to hire an investigator. He argues that a private investigator could have called into question Kennedy's testimony. Petitioner states that (1) he hired a private investigator to conduct video surveillance of the warehouse; (2) his investigator's camera had a more powerful magnification than that used by the investigating officer; and (3) various tests conducted around the warehouse showed that the linear distance was insufficient to effectively identify anyone from a camera mounted on the police building.

Petitioner attaches an affidavit from investigator Weiss. Weiss states he used a camera equipped with a 460X digital zoom apparatus. (Pet. Brief at Ex. G.) He states that he positioned himself at the warehouse on 700 North Throckmorton street and directed his camera toward the courthouse buildings on Belknap Street. Weiss states he was unable to see any person located at the courthouse buildings with sufficient detail to identify

them. (*Id.*) He also states that the South (central) entrance of the warehouse was not visible from Belknap Street due to an adjacent industrial building that has been there for approximately twenty years. (*Id.*)

Petitioner failed to show that his counsel was ineffective for not hiring an investigator to perform the investigation that Weiss performed. Petitioner cites to Kennedy's testimony regarding the use of the camera. (III SF at 36-37, 155.) Kennedy did not describe the camera beyond stating that the camera had "a high-powered lens with day and night vision" that "was able to zoom in on the warehouse enough for [the officers] to monitor activities there." (*Id.* at 37.) Although Petitioner states in his brief that Weiss's camera was "a camera with a more powerful magnification than that of the investigating officer," (Pet. Brief at 8), Petitioner offers no evidence regarding the type or magnification of the police camera. Further, the police camera was mounted in the Fort Worth Police Department's downtown building on the third floor, a location that was elevated. (*Id.*) Weiss did not show that (1) his camera was elevated, (2) in the same location as the police camera, and (3) the same distance from the warehouse as the police camera. Petitioner failed to show that his counsel was deficient for failing to hire an investigator and that such a deficiency prejudiced him.

Petitioner claims counsel was ineffective for failing to call Petitioner's wife and step-daughter to testify that his consent to search the house on Clinton was coerced by the officers' having pointed their weapons at them. Along the same lines, he claims counsel was ineffective for failing to request that the trial court charge the jury under TEX. CODE CRIM. PROC. art. 38.23 to disregard any evidence obtained from the Clinton Avenue residence due to his

coerced consent to the search.[17] The state court of appeals determined that counsel did not provide ineffective assistance by failing to call the wife and step-daughter to testify because the facts did not support a coercive consent claim. *Cantu,* Slip Op. at 11, 13-15. It further found that the evidence before the jury did not raise the issue of voluntariness of the search, and therefore because Petitioner was not entitled to a jury charge on that matter, counsel's failure to request one was not ineffective assistance. *Cantu,* Slip Op. at 11, 15.

The state appellate court reviewed the transcript of the hearing on the motion for new trial and recited the following facts about the alleged coerced consent. Petitioner, his wife, and his step-daughter testified similarly that the officers forced entry into their house on Lee late on November 30, 1994, with their guns drawn. Some officers wore masks, and they were all dressed in black. Other family members were present, including Petitioner's mother-in-law, his two children, and his step-daughter's child. The officers placed handcuffs on Petitioner and

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[17] TEX. CODE CRIM. PROC. art. 38.23 states in relevant part:

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of United States of America, shall be admitted into evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. art. 38.23(a).

placed him on a chair in the living room. He was dressed only in his underwear. The officers holstered their weapons and instructed the other family members to sit on couches in the living room. The officers searched the house for more than an hour. The family deplored the officers' behavior. One officer said Petitioner was fat; another brought in a search dog that frightened Petitioner's fourteen year-old daughter; and others laughed. The officers kept questioning Petitioner to learn where he kept the rest of his money. Petitioner initially denied that he had more money, but he finally agreed to take the officers to the money. Afterward, he said he had done so to protect his family from the officers.

At the new trial hearing, counsel testified that he objected to the admission of evidence seized in the Clinton Avenue house on relevancy grounds, rather than on the basis of coercive consent. He admitted he did not file a motion to suppress the evidence or request a jury charge under article 38.23. Counsel explained that he did not think the judge would grant a motion to suppress because Petitioner signed a consent to search the premises and "the police officer said it happened in regular order." Counsel conceded in hindsight that he probably should have requested the instruction, even though he did not think a jury instruction would have cured any taint caused by the evidence of the money found in the Clinton house.

The state appellate court applied the United States Supreme Court's decision in *Schneckloth v. Bustamonte,* 412 U.S. 218, 227 (1978) to these facts. It found that the officers' conduct did not rise to the level of coercion considering the totality of the circumstances. It noted that the officers were legally on the premises pursuant to a valid search warrant. They gave Petitioner his *Miranda*

warnings and holstered their weapons within fifteen minutes of their entry. The consent was obtained more than an hour after the raid started. When the officers asked if they could search, Petitioner responded, "Yes" and that he "didn't have any problem with that." The appellate court concluded that Petitioner was acting from a desire to appear cooperative rather than from fear for the safety of his family. It further noted that the written consent contained a written admonishment that Petitioner had the right to refuse and that Petitioner is familiar with the English language. The state court concluded that counsel did not provide ineffective assistance in this regard.

Judicial scrutiny of counsel's performance must be highly deferential; the court must make every effort to eliminate the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time. *Strickland,* 466 U.S. at 689. This Court agrees that counsel's decision with respect to consent was a matter of trial strategy. Petitioner failed to show either deficient performance or prejudice with respect to counsel's handling of the alleged coerced consent.

Petitioner argues his counsel was ineffective for failing to warn him against testifying on his own behalf. Petitioner states his counsel did not inform him that his oral statements made in an alleged "oral confession" to police officers would become admissible if he testified. (Pet. Brief at 19.) As support for this claim, Petitioner cites testimony of his counsel on the motion for new trial. (IX SF at 111-112) In response to the prosecutor's question regarding what he did to prepare Petitioner for trial, Petitioner's counsel states that he met with Petitioner several times and that he provided Petitioner with prior statements he made regarding facts in the case, including

statements arising from the forfeiture cases. (*Id.*) Petitioner's counsel testified: "And I told him to read all of it. I told him that if he testified – I anticipated that his statements might even come in on the State's case in direct, so I said, 'This is what they are going to say that you said. This is what they are going to say happened.'

> Q. (Prosecutor) Specifically, did you tell him that if he testified, those statements would definitely come in or he would be asked about them?
>
> A. (Counsel) I told him if he testified, he would be asked about them so I wanted him to look them over.

*Id.* at 111-112. The state court found that trial counsel advised Petitioner not to testify, and that counsel advised Petitioner that if he chose to testify incriminating statements would "come in" or "he would be asked about them." *Cantu,* Slip Op. at 16. Petitioner failed to meet his burden under *Strickland* with respect to this claim.

Petitioner claims his counsel was ineffective for failing to object to the Court's jury instruction on extraneous offenses. The jury instruction stated that the jury could use this information in deciding Petitioner's credibility. Specifically, the jury instruction provided:

> You are instructed that if there is any testimony before you in this case regarding the defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and

> even then you may only consider the same in determining the credibility of the defendant and for no other purpose.

(X SF, Ex. 32 at 3.)

The Honduran drivers license was admitted during the testimony of Officer Dotson who testified that the Honduran drivers license was part of the paperwork seized from the warehouse. (IV SF at 116-17) Petitioner's attorney objected to the admission of the drivers license as evidence of an extraneous offense. (*Id.* at 17-21.) The trial court overruled counsel's objection and admitted the drivers license. (*Id.* at 21.)

On cross-examination, the prosecutor asked Petitioner about the drivers license. (V SF at 167-69) Petitioner admitted that the license contained his picture and thumb print, and that he was not Arturo Lopez, the person named on the license. (*Id.* at 167-68) Trial counsel again objected on the ground that it was an extraneous offense, but the court overruled the objection. (*Id.* at 167.) Petitioner testified that he used this drivers license so that when he travels to Honduras, the police will think he is Honduran. (*Id.* at 168-69.) He believed this would keep the police from stopping him or trying to obtain money from him. (*Id.*) The prosecutor introduced evidence which showed that Petitioner used the name Arturo Lopez when he wire-transferred money to Mexico. (IV SF at 106-07.)

The trial court admitted the drivers license into evidence over counsel's objection. The appellate court found that the instruction, although objectionable under Texas law, actually inured to Petitioner's benefit because it limited the purpose for which the jury could consider the drivers license evidence. *Cantu,* Slip Op. at 17. Further,

Petitioner testified throughout direct examination that he knew nothing about the marijuana, and he testified on cross-examination regarding the reasons that he had a fake drivers license. (V SF at 168-69.) The extrinsic evidence was proper to show the link to the contraband and the untruthfulness of Petitioner's statements that he had no link to the contraband. Further, the state court found that even if counsel should have objected to the instruction, Petitioner failed to prove that he was prejudiced as a result. *Cantu,* Slip Op. at 18. The Court agrees that Petitioner failed to show he was prejudiced by counsel's failure to object to the instruction.

Petitioner argues his counsel was ineffective for failing to object to Court's instruction regarding joint possession of the marijuana. Petitioner states his failure to object to the omission of a "law of the parties" instruction allowed Petitioner to be convicted for the co-defendant's conduct without requiring proof that Petitioner was criminally responsible under the law of parties.

The Court instructed the jury as follows:

> You are instructed that an actor may with another or others jointly possess a controlled substance and such possession need not be exclusive. However, mere presence alone where a controlled substance is being possessed by others does not justify a finding of joint possession.

(X SF, Ex. 32 at 2.) Generally, the "law of parties" is found at Texas Penal Code Sections 7.01, et seq. That section addresses criminal responsibility for the conduct of another. The appellate court found that trial counsel did not provide ineffective assistance because, under Texas law, (1) a charge on joint possession does not require a charge on

the law of parties and (2) no such charge was required in this case. *Cantu,* Slip Op. at 18. The state court found that Petitioner's conduct was sufficient to sustain the conviction. Counsel explained that he did not request an instruction on the law of parties because he "didn't want to have to argue we had any contact with Maldonado as to the marijuana because our contention was that we had no contact and therefore were not guilty either as a party or as the direct principal." (IX SF at 99.) The state court found that counsel's decision was clearly a result of trial strategy. *Cantu,* Slip Op. at 19. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland,* 466 U.S. at 689. In this case, although Petitioner attempted to show counsel's action was not a result of trial strategy, the state court decision that it was trial strategy did not amount to an unreasonable application of *Strickland.* Petitioner's claim is without merit and should be denied.

Treating Petitioner's allegations as individual ineffective assistance of counsel claims, the state court held that Petitioner failed to rebut the presumption that counsel's performance in each of these instances fell below an objective standard of reasonableness, or, if so, that he was prejudiced as a result. The state court then considered whether the cumulative effect of the alleged errors amounted to ineffective assistance of counsel. The appellate court stated:

> Nor can we conclude, after reviewing the totality of counsel's representation and the evidence presented at trial, that the combined effect of the alleged errors is so prejudicial as to require

> reversal -- i.e., that absent counsel's errors, the jury would have had a reasonable doubt as to [Petitioner's] guilt.

*Cantu,* Slip Op. at 19 (citing *Strickland,* 466 U S. at 695).

This Court has considered the state court decisions that Petitioner failed to prove ineffective assistance of counsel, both with respect to the individual claims and their cumulative effect. The state court decisions are not contrary to and do not involve an unreasonable application of *Strickland.* Moreover, they are not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

**(4.) Ineffective Assistance of Appellate Counsel**

Petitioner claims appellate counsel provided ineffective assistance by failing to raise additional issues on appeal.[18] A claim of ineffective assistance based on the failure to argue an issue on appeal is governed by the familiar two-part *Strickland* test, which requires us to determine whether: (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant.

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[18] Appellate counsel raised the following claims on appeal: (1) counsel's alleged conflict of interest, (2) counsel's failure to investigate and call Mitchell, Petitioner's wife and his step-daughter, (3) counsel's failure to object to evidence of the money seized from the hidden room in the house on Clinton Street or seek suppression on the grounds that the consent to search was coerced, (4) counsel's failure to warn him that his statements would come into evidence if he testified, (5) counsel's failing to object to errors in the admission of evidence and various jury instructions, and (6) a number of sub-issues.

*See Roe v. Flores-Ortega,* 528 U.S. 470, 476 (2000) (citing *Strickland,* 466 U.S. at 687). An appellate counsel is not deficient for not raising frivolous issues on appeal or even for not raising every non-frivolous issue. *Strickland,* 466 U.S. at 688. To be deficient, the decision not to raise an issue must fall "below an objective standard of reasonableness." *Id.*

Petitioner faults appellate counsel for failing to raise on appeal a number of issues based upon various state officials' failure to file their oaths of office. Petitioner's claims regarding appellate counsel's failure to raise these issues on appeal are without merit. After considering the record and Petitioner's arguments in this regard, the Court concludes that the decision on habeas corpus review that appellate counsel did not provide ineffective assistance of counsel is not contrary to *Strickland.* Additionally, it does not involve an unreasonable application of *Strickland.* Furthermore, the state court decision is not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

**(5.) Trial Court Error**

Petitioner claims the trial court committed several errors in the admission of evidence and in the charge to the jury. Federal habeas corpus relief does not lie for errors of state law. *Estelle v. McGuire,* 502 U.S. 62, 66 (1991); *Lewis v. Jeffers,* 497 U.S. 764, 780 (1990); *Pulley v. Harris,* 465 U.S. 37, 41 (1984). Admissibility of evidence is a matter of state law, and only a contention that the admission of the challenged evidence rendered the trial fundamentally unfair or violated a specific constitutional

right will be considered in a federal collateral proceeding. *Edwards v. Butler,* 882 F.2d 160, 164 (5th Cir. 1989); *Johnson v. Blackburn,* 778 F.2d 1044, 1050 (5th Cir. 1985) (citing *Meyer v. Estelle,* 621 F.2d 769, 771 (5th Cir. 1980)). An evidentiary error in a state trial does not justify federal habeas corpus relief unless it is of such magnitude as to constitute a denial of fundamental fairness under the Due Process Clause. *Skillern v. Estelle,* 720 F.2d 839, 852 (5th Cir. 1983). Federal courts will not review a state court's interpretation of its own law in a federal habeas corpus proceeding. *See Moreno v. Estelle,* 717 F.2d 171, 179 (5th Cir. 1983).

**(5a.) Alleged Errors in the Admission of Evidence**

Petitioner argues that the trial court erred by allowing Kennedy to testify regarding what was depicted on the police surveillance tape. Petitioner states that the tape was never produced, that this testimony constituted hearsay, and that it was improper as uncorroborated under Texas Rules of Evidence §§ 1002-1003. (Pet. Brief at 21-22.) To support his contention, Petitioner cites to Kennedy's testimony. (Pet. Brief at 21, citing III SF at 36-42.) Kennedy testified to his opinion that what he saw on the videotape was consistent with what he personally observed during his surveillance. In a federal criminal trial, the admission of an officer's opinion derived from surveillance is discretionary with the Court. *See, e.g., United States v. Virgen-Moreno,* 265 F.3d 276, 295 (5th Cir. 2001). Petitioner cites no authority to support his contention that the admission of this testimony constitutes trial error that violated his right to due process.

Further, Petitioner argues that Kennedy's testimony regarding dates and times of events portrayed on the videotapes was improper. (Pet. Brief at 22, citing III SF at 155-63.) This testimony was elicited by Petitioner's counsel on cross-examination. Counsel asked Kennedy when he initiated camera surveillance. (*Id.* at 154) He further inquired regarding what was depicted on the tapes, how the tapes were lost, and what day and time the eighteen-wheeler was seen pulling into the warehouse. (*Id.* at 155-163) Petitioner cannot complain that the trial court admitted evidence that his counsel elicited. *See United States v. Raymer,* 876 F.2d 383, 388 (5th Cir. 1989) (a defendant cannot complain on appeal of alleged errors that he invited or induced, particularly where it is not clear that the defendant was prejudiced thereby); *see also Moraguez v. State,* 701 S.W.2d 902 (Tex. Crim. App. 1986) (finding where defendant offers same evidence to which he earlier objected, he cannot claim error). Petitioner has not shown that the trial court's admission of testimony about the surveillance tape rendered the trial fundamentally unfair or violated any of Petitioner's constitutional rights.

Petitioner argues the trial court erred in admitting the Honduran drivers license into evidence. He claims it constituted evidence of an extraneous offense, i.e., forgery, and that it was improper for the prosecutor to cross-examine Petitioner on this evidence. (Pet. Brief at 23.)

The Court is not convinced that the drivers license constituted evidence of forgery, as Petitioner contends. Assuming that it did, a defendant's right to due process is not violated when the prosecution makes a strong showing that the defendant committed the offense and the extraneous offense is rationally connected to the offense charge. See *Story v. Collins,* 920 F.2d 1247, 1254 (5th Cir. 1991). In

this case, the state appellate court found that the trial court could have determined that the evidence "had relevance, by linking appellant to the contraband in the warehouse, beyond its tendency to prove character and that its probative value was therefore greater than any prejudicial effect it may have had on the jury." *Cantu,* Slip Op. at 21. Evidence of extrinsic offenses is admissible if it is (1) relevant to an issue other than the defendant's character, and (2) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice and it otherwise meets the requirements for admission. *United States v. Beachum,* 582 F.2d 898, 911 (5th Cir. 1978); *United States v. Peters,* 283 F.3d 300, 312 (5th Cir. 2002). Petitioner has not shown that the extrinsic evidence was admitted solely as character evidence rather than for permissible reasons and that the danger of unfair prejudice outweighed its probative value.

Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Beachum* at 911. As for the second prong of the test, in the court's determination of the probative value and unfair prejudice, the court must make "a common sense assessment of all circumstances surrounding the extrinsic evidence." *Id.* at 914. The record shows that the state made a strong showing of Petitioner's guilt. Petitioner has not shown that admission of the drivers license so infected the trial with unfairness that he did not receive due process nor has he shown that its admission violated any constitutional right. This claim does not entitle Petitioner to relief.

Petitioner argues the trial court erred when it refused to rule on counsel's objections that the affidavits used to

support the search warrants were not sufficient to support probable cause. (Pet. Brief at 24.) Petitioner is mistaken. The trial court did rule on Petitioner's objection, finding it to be untimely. Petitioner failed to show that the trial court's ruling with respect to the affidavits in support of the search warrants so infected the trial with unfairness that he was denied a fair trial, or that the ruling violated his constitutional rights.

### (5b.) Trial Court Error in Instructing the Jury

Petitioner argues the trial court erred when it refused to submit a jury charge on a lesser included offense of possession over four ounces, but less than five pounds, of marijuana. (Pet. Brief at 23.) Petitioner argues the state's witness (1) guessed at the weight of the stems, (2) did not keep notes of the individual weight of various packages of marijuana blocks and (3) commingled and confused exhibits that he received. Petitioner also argues that of the 83 blocks of marijuana found, only four had masking tape on them. His fingerprint was only found on one of the blocks with the masking tape. Petitioner argues the jury could have concluded Petitioner possessed only that one block of marijuana (which was around 8.35 pounds) or that he only possessed the four blocks with masking tape on them. (Pet. Brief at 23.)

Petitioner cites no authority to show that trial court erred by failing to a jury charge on the lesser included offense. An alleged error in a state trial court's instructions is cognizable in a federal habeas petition only when a petitioner shows that the error by itself so infected the entire trial that the resulting conviction violated due

process. *Henderson v. Kibbe,* 413 U.S. 145, 155 (1977). Petitioner cites no Supreme Court authority addressing the circumstances under which a state court is obligated to give a lesser included instruction in a non-capital case. The Fifth Circuit has consistently held that the failure to give instructions on lesser included offenses does not raise a cognizable claim. *See Creel v. Johnson,* 162 F.3d 385, 390-91 (5th Cir. 1999). Further, the state appellate court considered Petitioner's claim and found it to be without merit. Petitioner has not shown that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Further, he has not shown that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Petitioner also argues that the trial court's instruction regarding the extraneous offense constituted an improper comment on the weight of the evidence. (Pet. Brief at 23.) Petitioner claims the instruction violated Texas Code of Criminal Procedure art. 36.14. (*Id.*). However, an error under state law does not provide a basis for federal habeas relief. See *Engle v. Isaac,* 456 U.S. 107, 119 (1982); *Pemberton v. Collins,* 991 F.2d 1218, 1223 (5th Cir. 1993). Petitioner failed to make the requisite showing that would entitle him to federal habeas corpus relief. Petitioner's claim should therefore be denied.

**(6.) <u>Petitioner's Claim that He Was Denied an Impartial Jury Trial</u>**

Petitioner claims he was denied an impartial jury trial because the prosecution struck all the minority panel

members during voir dire. (Pet. Brief at 24.) He argues the prosecutor's peremptory strikes were racially motivated in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). (*Id.*) A state violates a defendant's rights under the Equal Protection Clause if it strikes potential jurors solely on the basis of race. *Batson*, 476 U.S. at 89. Under *Batson*, a defendant must make a prima facie showing that the prosecutor has exercised a peremptory challenge on the basis of race. *Id.* at 96-97. If that showing is made, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. *Id.* at 97-98. In light of the parties' submissions, the trial court must then determine whether the opponent of the strike has proved purposeful racial discrimination. *Id.* at 98. The critical question at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1040 (2003) (citing *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*)). Implausible or fantastic justifications are usually pretexts for purposeful discrimination. *Purkett*, 514 U.S. at 768. The *Batson* determination is primarily based on the trial court's evaluation of the credibility of counsel's explanations. *United States v. Wallace*, 32 F.3d 921, 925 (5th Cir. 1994).

Petitioner is Hispanic. Trial counsel objected to the composition of the jury, and the trial court concluded after a hearing that the jury selection was race neutral. (II SF at 180-88.) Counsel challenged the state's excusing Shevetta Jackson, Michael Karas, Vernon Newton, Pablo Zurita and Estella Barrera, all of whom appeared to be minorities. (*Id.*) The trial court asked the State to explain its reasons for striking these members of the jury panel.

The State explained that it struck Jackson, an African-American female, because (1) she was a postal employee;

(2) she gave a cursory answer when asked specifically about her family members, their involvement in drugs, and her reaction; and (3) she was a single unwed mother. The State showed that it exercised a peremptory challenge against a white venire person for similar reasons. The State's explanation for striking Harris, an African-American male, was that (1) he was a single unwed father, and (2) he had trouble completing his jury questionnaire. With respect to the latter reason, the prosecutor stated that Harris misunderstood a simple question, misspelled a number of words, and responded lightheartedly to the questions.

Concerning the reasons for striking Barrera, the prosecutor mentioned that Barrera had trouble with the English language, was born in Mexico and spoke with an Hispanic accent. He explained that she listed her occupation as teacher on the questionnaire and then stated she was really a day care director. He noted that she had misspelled "child development" and "married" on the questionnaire. The prosecutor stated that during voir dire, Barrera was "fuzzy" about the day care center's organization. She stated it was a "new facility," but responded that she had worked there ten years. Upon a request for clarification, she admitted it had "been there awhile." The prosecutor concluded he should strike her because she was either being evasive or did not have a good grasp of English.

With respect to Newton, the prosecutor stated that he was vocal and conveyed a light-hearted attitude. The prosecutor noted the following reasons for striking him: Newton stated he had been mistreated by the police. He was also untruthful about his criminal history. Additionally, he had an uncle who was a crack addict, and Newton had displayed mixed emotions about that fact.

Finally, the prosecutor stated with respect to Zurita that (1) he filled out less than half of his questionnaire, (2) stated his primary language was Spanish and (3) misspelled three words on the questionnaire. The prosecutor felt that either Zurita did not understand English well enough to complete the questionnaire or was hiding something. The prosecutor struck him for both of those reasons.

The trial court held that the defendant failed to prove that the prosecutor struck any of these jurors based upon purposeful racial discrimination. Petitioner did not raise a *Batson* claim in his motion for new trial or on appeal. Petitioner raised this claim in his state habeas corpus application. The trial court found no necessity for a fact-finding hearing on any of Petitioner's claims and ordered that relief be denied. *Ex Parte Cantu,* No. 52, 780-01 at 83. The Texas Court of Criminal Appeals denied the application without written order. *Id.* at cover.

Petitioner argues that discriminatory intent is inherent in the State's explanations because from a pool of 50 prospective jurors, all the minorities were struck with peremptory strikes. Petitioner admits that he used a peremptory strike on an Hispanic juror, but states that she "did not appear to be a[n] Hispanic person." (Pet. Brief at 25.)

The State gave several non-discriminatory reasons for striking each panel member, and the trial court credited the State's explanations. In the case of Shevetta Jackson, the State showed that it had struck a white venire person for similar reasons. (II SF at 180-81.) The State struck three of the jurors because it was concerned about their ability to understand English, their intelligence and in

some cases their evasiveness or even deceptions. The State referred the trial court to the juror's answers during voir dire and to their questionnaires. The jurors had misspelled a number of simple words, misunderstood some questions and left other questions unanswered.

The Court has examined each of the references to the record that Petitioner has provided in support of his *Batson* claim. Petitioner has provided no proof to support the contention that the trial court should have disbelieved the prosecution's race-neutral explanations for its use of peremptory strikes on the five jurors in question. The Court has no reason to disagree with the trial court's credibility determination. Petitioner has not shown that the state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the United States Supreme Court or that it was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. No *Batson* violation occurred.[19] Habeas relief on that ground is not warranted.

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[19] In his brief in support of his *Batson* claim, Petitioner concludes with the following statement: "Even if not apparent from the face of the record, counsel was ineffective for not raising the issue on appeal as a fundamental issue was in the record and overlooked." To the extent Petitioner may be attempting to raise an ineffective assistance of appellate counsel claim by this sentence, his claim should be denied. He has not shown that appellate counsel's performance was deficient or that he was prejudiced. Counsel did not provide ineffective assistance on appeal by failing to raise a meritless *Batson* claim.

**(7.) Lack of Probable Cause for the Arrest and Search Warrants**

Petitioner argues the affidavits to support the arrest and search warrants were not based on the requisite probable cause. (Pet. Brief at 20.) Petitioner argues the affidavit was supported primarily by Kennedy and a confidential informant. He states the affidavit does not provide a substantial link between him and illegal activity.

Probable cause is "a practical common sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238 (1983). "[O]nly the probability, and not a prima facie showing of criminal activity is the standard of probable cause." *Id.* at 235. Further, courts must give great deference to the issuing judge's determination. *Id.* at 236.

The Court finds the affidavits contained sufficient information to link Petitioner to the illegal activity and to establish probable cause. The affidavit is not a bare-bones statement, but instead contains eleven pages of detailed information. The affidavit establishes that Kennedy had eight years of police officer experience and that was, at that time, assigned to the Narcotics Task Force. It further indicates that Kennedy was personally involved in the investigation of Petitioner's home and the warehouse location. The affidavit states that a confidential informant advised Kennedy that Petitioner, Maldonado and others were receiving routine marijuana shipments from Mexico in amounts ranging from one thousand pounds to one ton.

The informant said that he or she was a close friend of the Maldonado family and gave Kennedy Maldonado's

home address. The informant also gave Kennedy the following information: (1) Petitioner and Maldonado were the two highest ranking members of the marijuana organization; (2) the shipments were concealed in commercial vehicles; (3) Petitioner employed Maldonado; (4) Petitioner stores the marijuana in a warehouse and (5) Maldonado travels to the warehouse. The informant described Petitioner and his vehicle in detail.

The affidavit established that Kennedy (1) attempted to identify the warehouse location; (2) followed Maldonado with the help of a police helicopter and (3) saw Maldonado meet with a known drug dealer. Kennedy stated that, based on his experiences as a trained narcotics officer, he believed that narcotics transactions were taking place between Maldonado and the known marijuana dealer. The confidential informant told Kennedy that Maldonado said he was currently "out of weed" and was about to go to the warehouse. Kennedy then personally conducted surveillance and followed Maldonado, with the help of a police helicopter. Maldonado went to a warehouse at 700 N. Throckmorton Street. Kennedy stated the warehouse was a large building capable of having large commercial trucks enter the building where they were completely concealed. Kennedy personally saw Maldonado enter the warehouse. Kennedy also saw Petitioner at the warehouse. Kennedy saw Maldonado leave the warehouse and later saw Petitioner leave, as well. Kennedy followed Petitioner to his residence at 1210 Lee Avenue. The confidential informant told Kennedy that immediately after Maldonado returned home, he or she made contact with Maldonado and observed that Maldonado had a large quantity of marijuana concealed in his truck.

Kennedy determined that Petitioner was the person responsible for paying the utility bills at the warehouse at 700 N. Throckmorton. Kennedy stated he personally conducted surveillance on th warehouse and that no legitimate business transactions occurred there. Kennedy stated that Petitioner was the only person who was ever alone in the building. The confidential informant observed that Maldonado was in possession of large amounts of cash that were concealed in a sack or other container and that Maldonado stated the currency was derived from the sale of marijuana. He said he was taking it to the warehouse to pay Petitioner in advance for more marijuana. Kennedy personally observed Petitioner leave the warehouse, drive directly to his residence and remove a container that was consistent with the size that may be used for large amounts of currency. Kennedy also stated he observed a large commercial truck enter the warehouse where it was completely concealed.

Information supplied by confidential informants can establish probable cause. *Id.* at 232. Petitioner claims the affidavit contains hearsay. An affidavit may rely on hearsay as long as the affidavit presents a "substantial basis for crediting the hearsay." *Gates,* 462 U.S. at 242. In determining whether an informant's report is credible, the court examines the informant's veracity and basis of knowledge. *Id.* at 230-33. An informant's basis of knowledge can be established by a particularly detailed tip. *United States v. Jackson,* 818 F.2d 345, 349 (5th Cir. 1987). The credibility of informants can be established by first hand knowledge, the detail of the information given, or by corroboration. See *United States v. Fields,* 72 F.3d 1200, 1214 (5th Cir. 1996). It is not necessary that the affidavit identify the informant by name. See *United States v.*

*Harris,* 403 U.S. 573, 584-85 (1971). Finally, an affidavit need not detail the manner in which the affiant gathered the information. See *United States v. Brown,* 941 F.2d 1300, 1304 (5th Cir. 1991).

Kennedy stated the confidential informant has proved reliable information in the past that has led directly to the seizure of large amounts of marijuana. The detailed information from the informant and the veracity of the informant's previous tips sufficiently established the informant's credibility. See *United States v. McKnight,* 953 F.2d 898, 905 (5th Cir. 1992) (finding assertion that informant in the past had given true and reliable information sufficiently established veracity); *United States v. Barbin,* 743 F.2d 256, 256 (1984) (finding veracity was established where informant in the past gave information resulting in several arrests and convictions). Petitioner's claim that probable cause was lacking because of a lack of veracity or reliability of the informant is without merit.

Petitioner further argues the affidavit lacked veracity and a sufficient basis of knowledge due to numerous inconsistencies in the affidavit. Petitioner states Kennedy "embellished" and "contradicted" his statements. For an example, he claims that Kennedy stated in one place that a second vehicle drove out of the warehouse "immediately" and in another that the second vehicle left "within minutes." Petitioner also argues Kennedy made inconsistent statements by alleging that the warehouse bay doors remained closed at the building during normal business hours, but that when Maldonado drove into the warehouse the bay door was, in fact, open. This could have occurred during normal business hours and Kennedy did not mention whether the bay door was closed after Maldonado drove in. Petitioner argues Kennedy avers that he conducted spot checks, but

later states he conducted lengthy and extensive surveillance. Petitioner argues that Kennedy stated he conducted spot checks at night, but also alleged that he observed the warehouse during normal business hours. Finally, Petitioner complains that the informant, if he or she was privy to information regarding a marijuana operation, should have known where the warehouse was located.

These alleged "inconsistences" are without merit. The Supreme Court has held that "line-by-line scrutiny" of the underlying affidavit is not appropriate. *Gates,* 462 U.S. at 246 n. 14. The Court noted that affidavits are typically drafted by non-lawyers in the midst and haste of a criminal investigation and that "[t]echnical requirements of great specificity . . . have no proper place in this area." *Gates,* 462 U.S. at 235. This Court notes that the terms "within minutes" and "immediately" are not necessarily inconsistent. Further, although Kennedy said that the bay doors were closed during normal business hours, that statement is not necessarily inconsistent with the statement that the door was opened to allow Maldonado or Petitioner to enter the warehouse. The affidavit states that Kennedy conducted spot checks, as well as other surveillance and that this surveillance occurred during the day and evening. (Affid. ¶ 8). Petitioner is not entitled to relief on his claims that inconsistencies within the affidavit render the warrants without probable cause. He has failed to show that the state court decisions with respect to his claims regarding the affidavits entitle him to federal habeas corpus relief.

In a closely related claim, Petitioner contends that trial counsel was ineffective for failing to challenge the validity of the warrants, their supporting affidavits or the reliability of the informant and investigating officer.

Counsel filed a motion to suppress the evidence obtained under the warrant, but did not request a pretrial hearing on the motion. Nevertheless, Petitioner failed to prove that counsel's performance was deficient. Moreover, Petitioner did not show that he was prejudiced. The trial court would have denied a pretrial motion to suppress the evidence because the affidavits and warrants are valid. Counsel did not provide constitutionally ineffective assistance by failing to raise a meritless claim. *See Clark,* 19 F.3d at 966.

**(8.) Petitioner's Claim that the Trial was not Fair and Impartial**

Petitioner claims that the entire trial was overwrought with the lack of credible testimony, ineffective assistance of counsel, improper juror selection and insufficiently corroborated evidence. Petitioner makes conclusory allegations that the identification of the informant was never revealed, the surveillance logs were absent, the investigative officer contradicted his own testimony and trial counsel was ineffective in his representation. As a result, Petitioner concludes that he was convicted and received the maximum sentence. The state court denied Petitioner relief on this ground. Petitioner's argument implicates the cumulative error doctrine. It provides that "an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Munoz,* 150 F.3d 401, 418 (5th Cir. 1998). After considering the record and Petitioner's allegations and arguments, the Court concludes that Petitioner has failed to establish the requisite aggregation of errors in the conduct of his state trial. Therefore, relief is not available under the cumulative

error doctrine. Moreover, Petitioner has failed to meet the 2254(d) standards to show that he is entitled to habeas corpus relief on this ground.

## Conclusion

The Court has considered each of Petitioner's many claims and sub-claims, reviewed the state court decisions, the record and the arguments of the parties. The Court concludes that Petitioner has not shown that the state court decisions to deny relief are contrary to, or involved and unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. He has not shown that they resulted in decisions that were based on unreasonable determinations of the facts in light of the evidence presented in the state court proceedings. Accordingly, Petitioner is not entitled to habeas corpus relief.

## Recommendation

For the foregoing reasons, the Court recommends that Petitioner's habeas corpus petition pursuant to 28 U.S.C. § 2254 be DENIED with prejudice.

Signed June 23, 2003.

/s/ Paul D. Stickney
PAUL D. STICKNEY
UNITED STATES
MAGISTRATE JUDGE

## APPENDIX D

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

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| JESUS CANTU,<br>Petitioner,<br><br>V.<br><br>JANIE COCKRELL,<br>Director, Texas<br>Department of Criminal<br>Justice, Institutional<br>Division,<br>Respondent. | ) | No. 3:02-CV-2002-D |
| JESUS CANTU,<br>Petitioner,<br><br>v.<br><br>IMMIGRATION AND<br>NATURALIZATION<br>SERVICE,<br>Respondent. | ) | |

## ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Aug. 7, 2003)

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the Findings, Conclusions and Recommendation of the Magistrate Judge are correct and they are hereby adopted.

Signed this 7th day of August, 2003.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

## APPENDIX E

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

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| JESUS CANTU,<br>Petitioner,<br>V.<br>JANIE COCKRELL,<br>Director, Texas<br>Department of Criminal<br>Justice, Institutional<br>Division,<br>Respondent. | ) | No. 3:02-CV-2002-D |
| JESUS CANTU,<br>Petitioner,<br>v.<br>IMMIGRATION AND<br>NATURALIZATION<br>SERVICE,<br>Respondent. | ) | |

**JUDGMENT**

(Filed Aug. 7, 2003)

The Court has entered its Order Adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge in this case. It is therefore ORDERED, ADJUDGED and DECREED that Jesus Cantu's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED.

SO ORDERED this 7th day of August, 2003.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE

## APPENDIX F

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

4/25/2001
COA#: 02-98-00591-CR
RE: Case No. PD-1993-00
STYLE: CANTU, JESUS RIVERA

On this day, the Appellant's petition for discretionary review has been refused.

Troy C. Bennett, Jr.

Ward Casey
Attorney At Law
115 West Second Street, #201
Fort Worth, TX 76102

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OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

RE: Writ No. 52,780-01
STYLE: Jesus R. Cantu
TRIAL CT NO: C-4-5964-572256-A
August 14, 2002

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

DISTRICT CLERK TARRANT COUNTY
401 W. BELKNAP
FT WORTH TX 76196

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**APPENDIX G**

[LOGO]

**COURT OF APPEALS**
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 2-98-591-CR**

JESUS RIVERA CANTU — APPELLANT
V.
THE STATE OF TEXAS — STATE

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FROM CRIMINAL DISTRICT COURT
NO. 4 OF TARRANT COUNTY

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**OPINION**

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Jesus Rivera Cantu appeals his conviction for possession of more than fifty pounds but less than two thousand pounds of marihuana. A jury found appellant guilty of the offense and assessed punishment at twenty years' confinement and a $10,000 fine. In eight points on appeal, he complains of ineffective assistance of counsel and trial court error in the admission of evidence, in allowing improper cross-examination, and in charging the jury. We affirm.

## BACKGROUND

After several months of narcotic investigation and surveillance, on November 30, 1994, Fort Worth police officers obtained search warrants to search three Fort

Worth locations in connection with suspected illegal drug activity: a warehouse leased by appellant at 700 N. Throckmorton Street; appellant's residence at 1210 Lee Avenue; and the residence of Adolfo Maldonado at 2523 Bruce Avenue. The officers found over six hundred pounds of marihuana in the warehouse stored in boxes and two large deep freezers, scales, receipts for the deep freezers in the name of appellant, wrappings used to "bulk-bundle" marihuana, firearms, and appellant's Honduras driver's license under an assumed name. Appellant's fingerprint was later found on a strip of masking tape from one of the blocks of marihuana. At appellant's home on Lee Street, the officers found about $15,000 in cash, "50-pound capacity" scales, and firearms. After the search of his home, appellant signed a consent to search another house he owned on Clinton Avenue, where, among other things, three safes were found in an underground room containing over one-half million dollars. Finally, the officers found another one hundred pounds of marihuana inside a third deep freezer in Maldonado's home and $168,744 in cash.

## INEFFECTIVE ASSISTANCE OF COUNSEL

In points one through three, appellant asserts he was deprived of his Sixth Amendment right to effective assistance of counsel. U.S. CONST. amend. VI. Generally, an ineffective assistance claim has two components. First, appellant must show that his counsel's performance was deficient; second, he must show the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

Under the first prong of *Strickland*, appellant must show the attorney's representation fell below an objective

standard of reasonableness. *See id.* at 687-88, 104 S. Ct. at 2064. The issue is whether counsel's assistance was reasonable under all the circumstances and prevailing professional norms at the time of the alleged error. *See id.* at 688-89, 104 S. Ct. at 2065. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066.

The second prong of *Strickland* requires a showing that counsel's errors were so serious that they deprived the defendant of a fair trial, i.e., a trial whose result is reliable. *See id.* at 687, 104 S. Ct. at 2064. A defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See id.* at 694, 104 S. Ct. at 2068.

The question for our review is whether there is a reasonable probability that, absent counsel's errors, the fact finder would have had a reasonable doubt on the issue of guilt, considering the totality of the evidence. *See id.* at 695, 104 S. Ct. at 2069. However, our scrutiny of counsel's performance must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight. *See id.* at 689, 104 S. Ct. at 2065.

Appellant combines his argument of points one and two wherein he complains he was deprived of effective assistance of counsel because of a conflict of interest that affected counsel's performance and because counsel failed to adequately investigate the case.

Appellant's trial counsel entered an appearance as attorney of record for Adolfo Maldonado on January 11, 1995. Counsel subsequently notified the trial court clerk

that he represented appellant on February 1, 1995. Appellant appears to contend that because appellant's defensive posture at trial was that the marihuana found in the warehouse belonged to Maldonado and that it was Maldonado's "operation," counsel had a conflict of interest which precluded simultaneous representation of both defendants. Moreover, appellant alleges that because of this conflict, counsel did not adequately seek out and interview potential defense witnesses adverse to Maldonado's interests or assert a "plausible defense strategy," which would have incriminated Maldonado.

Appellant first raised the conflict of interest issue in his motion for new trial. Accordingly, appellant must show that an actual conflict of interest adversely affected his attorney's performance. *See Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067; *Cuyler v. Sullivan*, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 1719 (1980); *Calloway v. State*, 699 S.W.2d 824, 830 (Tex. Crim. App. 1985). Notwithstanding the *Strickland* requirements, upon a showing that an actual conflict of interest adversely affected his attorney's performance, resulting actual prejudice or harm need not be demonstrated. *See Ex parte Acosta*, 672 S.W.2d 470, 474 (Tex. Crim. App. 1984). The burden of showing an actual conflict of interest is on the appellant. *See Cuyler*, 446 U.S. at 348-49, 100 S. Ct. at 1718.

The mere fact of joint or multiple representation will not show an actual conflict of interest. *See Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S. Ct. 1173, 1178 (1978); *Calloway*, 699 S.W.2d at 828. Nor is mere assertion of a possible conflict of interest sufficient. *See Ferguson v. State*, 639 S.W.2d 307, 310 (Tex. Crim. App. 1982). An actual conflict of interest arises when one defendant stands to gain significantly by counsel adducing evidence

or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing. *See Ex parte Alaniz*, 583 S.W.2d 380, 381 n.3 (Tex. Crim. App. [Panel Op.] 1979).

At the hearing on motion for new trial, counsel testified that he was initially retained by Maldonado and later by appellant. He stated that he met with Maldonado only once or twice and that the contact was "purely superficial" and required that he communicate through Maldonado's son, who spoke English. After realizing the cases were related and that appellant's and Maldonado's defenses were "incompatible," he informed both Maldonado and appellant of the potential conflict and decided to continue to represent appellant only, in part because appellant spoke better English. Counsel referred Maldonado's case to another lawyer and forwarded Maldonado's retainer fee to that lawyer.[1] Sometime before April 1995, Maldonado fled the jurisdiction and remained at large at the time of the motion for new trial hearing. Counsel testified that the last contact he had with Maldonado was in early 1995. Although the record does not reflect that counsel ever filed a motion to withdraw or substitute counsel in Maldonado's case, he notified the Tarrant County District Attorney's Office by letter on September 29, 1995, that he was not the attorney of record for Maldonado. There is no evidence in the record to indicate counsel filed any other documents with the trial court on behalf of Maldonado or ever made

[1] The record does reflect that the other lawyer made an appearance on behalf of Maldonado in November 1995 at the forfeiture proceeding involving the money seized.

an appearance in court on Maldonado's behalf. Appellant's case came to trial in November 1998.

Because counsel's contact with Maldonado appears to have been very limited and remote in time, and because there was no joint trial of Maldonado and appellant, we cannot conclude appellant has shown that counsel actively represented conflicting interests at trial.[2] *See Calloway*, 699 S.W.2d at 830. To the contrary, counsel specifically testified that he was not concerned about Maldonado's interests once he arranged to have someone else represent him and that he probably did not even review the State's file in Maldonado's case. In short, appellant has failed to show that counsel struggled "to serve two masters." *Ex parte Acosta*, 672 S.W.2d at 474 (quoting *Glasser v. United States*, 315 U.S. 60, 75, 62 S. Ct. 457, 467 (1942)).[3]

For the same reasons noted above, we do not perceive, and appellant does not specify, how counsel's representation of Maldonado influenced counsel's investigation and preparation of appellant's case. Moreover, it does not

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[2] Appellant, in his reply brief, implies this case presents a case of "successive representation" as compared to "joint" or "multiple representation." Because the same principles apply, we do not distinguish between the two in this opinion. *See United States v. Young*, 644 F.2d 1008, 1012 (4th Cir. 1981).

[3] In appellant's reply brief, he also asserts trial counsel's dual representation violated rule 1.09 of the Texas Disciplinary Rules of Professional Conduct. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9). This argument is not persuasive given the fact that appellant testified that Maldonado "begged" him to consult with trial counsel. It is not unreasonable to infer from this fact that Maldonado, the "former" client for purposes of rule 1.09(a), consented to the dual representation.

appear to have precluded counsel from advancing appellant's defensive strategy of shifting blame to Maldonado at trial. Counsel elicited testimony from appellant implicating Maldonado in the crime and advanced this defensive posture in his closing argument. Accordingly, we cannot agree with appellant's contention that counsel "could have" or "would have" conducted or countenanced a different defense from the one undertaken. *See James v. State*, 763 S.W.2d 776, 782 (Tex. Crim. App. 1989).

Appellant also contends that counsel failed to adequately investigate the case and to contact potential defense witnesses. Appellant testified at trial that he had been in Mexico for several days and returned to Fort Worth on the night of November 28, 1994. He testified that Maldonado had asked to use the warehouse in his absence to do some repairs to his truck and that he had given Maldonado the keys to the warehouse. Appellant asserts that had counsel adequately sought out and interviewed potential defense witnesses, he would have called Bob Mitchell, the owner of the warehouse and appellant's landlord.

At the hearing on motion for new trial, Mitchell testified that appellant rented the warehouse to store construction equipment used in his business. He said that "around Thanksgiving time" in 1994, he saw Maldonado driving a white truck pulling a trailer and that Maldonado told him he was taking the trailer over to appellant's warehouse for "some welding and repair." Mitchell stated that he offered to be a witness for appellant more than once, but was never contacted by any lawyer or investigator concerning the case.

Appellant proposes that Mitchell's testimony would have benefitted him at trial, but "Maldonado's interests obviously would have suffered." Additionally, appellant proposes that Mitchell's testimony and the fact that his wife could have testified that he was in Mexico immediately before the drug bust, taken together, would have established that Maldonado placed the marihuana in the warehouse when he was not present.

Appellant's argument that counsel did not call Mitchell as a defense witness because his testimony would have incriminated Maldonado is not persuasive. Clearly, counsel believed that he had terminated his representation of Maldonado years before appellant's trial began and there is no indication in the record that his representation of Maldonado influenced his representation of appellant.

As to appellant's allegation that counsel failed to adequately investigate due to the alleged conflict, counsel testified that he thought appellant first told him about Mitchell during trial and that appellant told him that "he had been paying rent to Mr. Mitchell and that Mr. Mitchell knew he wasn't a drug dealer." He did not recall whether appellant informed him of Mitchell's alleged information concerning Maldonado's use of the warehouse. He stated that it was, however, the type of information that if brought to his attention would have made him "issue a subpoena for Mr. Mitchell." In fact, counsel testified that it is his usual practice to ask his clients if there is anyone they want subpoenaed to testify and that if appellant had told him about Mitchell, he would have issued a subpoena. Moreover, counsel met with appellant concerning the case possibly as many as, or more than, fifty times and independently reviewed the materials in the prosecutor's file. Based on this evidence, and because

appellant admitted that he never relayed the information to counsel because counsel "never allowed [him] to talk," we conclude that appellant has failed to demonstrate that counsel did not adequately investigate the facts of the case, or, in the exercise of ordinary competence, should have known to interview Mitchell as a potential defense witness. Points one and two are overruled.

In point three, appellant raises six "sub-issues" complaining of ineffective assistance of counsel. In sub-issue (a), appellant renews his argument that counsel failed to make an independent investigation of the facts and to interview prospective defense witnesses. Specifically, appellant contends counsel failed to interview Mitchell, his wife, and his step-daughter. We have already determined that counsel's performance was not deficient by failing to contact Mitchell. We further conclude appellant has not demonstrated ineffective assistance for failure to interview his wife and step-daughter. As previously noted, counsel met with appellant numerous times from1995 through the time trial began in 1998. He also had access to and examined the prosecution's file in the criminal case as well as the affidavits filed in the forfeiture case. The testimony given at the motion for new trial hearing does not necessarily establish that counsel should have known of these witnesses or that they possessed favorable information. In fact, counsel testified that appellant did not "really want [his wife] there during most of the trial." Appellant fails to direct this court to any other evidence or witnesses counsel could have possibly discovered had he conducted a more thorough investigation of the case that would have benefitted him at trial. Appellant has not overcome the strong presumption that counsel performed reasonably. *See Garrett v. State*, 998

S.W.2d 307, 313 (Tex. App. – Texarkana 1999, pet. ref'd, untimely filed).

In sub-issues (b) and (c), appellant contends counsel was ineffective by failing to object to evidence of the money seized from the Clinton Street address or request an article 38.23 instruction on the basis that appellant's consent to search the premises was coerced.[4] At the hearing on motion for new trial, appellant, his wife, and step-daughter testified similarly that the officers forced entry into the house on Lee Avenue late on November 30, 1994, with guns drawn. Some wore masks, and they were all dressed in black. Other family members were present, including appellant's mother-in-law, his two children, and his step-daughter's child. They put appellant in handcuffs and dragged him down the hall to the living room. He was dressed only in his underwear. The officers made appellant sit on a chair and holstered their weapons. The other family members were instructed to sit on couches in the living room while the officers searched the residence for

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[4] Article 38.23 of the code of criminal procedure provides in relevant part:

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2000).

more than an hour. One of the officers made fun of appellant and said he was fat. Another officer brought in a search dog, scaring appellant's 14-year-old daughter. The officers laughed. They kept asking appellant, "Don't you have some more money?" Appellant initially denied that there was more money, but finally agreed to take them to the money if they agreed to leave his family alone and not hurt his family.

Counsel testified that he objected to the admission of evidence seized in the Clinton Avenue house on relevancy grounds; not on the basis of coercive consent. He admitted that he did not file a motion to suppress the evidence or request a charge under article 38.23. He stated that he did not think the judge would have granted a motion to suppress because appellant had signed a consent to search the premises and "the police officer said it happened in regular order." Moreover, counsel conceded that, although he did not think a jury instruction would have realistically cured any taint the evidence of the money found in the Clinton Avenue house would have had, he "probably" should have requested an article 38.23 instruction given appellant's version of events.

Although the officers' presence in the house when the raid occurred on appellant's home surely upset, and possibly embarrassed, appellant and his family given their rendition of the officers' actions and remarks, we cannot conclude the officers' conduct rose to the level of coercion considering the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048 (1973). The officers were legally on the premises pursuant to a valid search warrant. Appellant signed the written consent to search the Clinton Avenue house more than an hour after the officers initiated the raid, *Mirandized*

appellant, and holstered their weapons. Appellant specifically testified the officers holstered their weapons within fifteen minutes of their entry. Additionally, at trial appellant testified that when the officers asked if they could search the Clinton Avenue house, he responded, "Yes" that he "didn't have any problem with that," implicating at the time he consented to the search he was attempting to appear cooperative with the officers, not acting out of fear of the officers or concern for the safety of his family. Moreover, the written consent signed by appellant, and witnessed by two officers, contains an admonishment that appellant had the right to refuse consent, and the record shows appellant is familiar with the English language.[5] On this record, we cannot conclude a motion to suppress would have had merit. Nor is it unreasonable to assume that trial counsel was aware that appellant's version of events did not create a factual basis for a finding that the search was not freely and voluntarily given. *See Yuhl v. State*, 784 S.W.2d 714, 717 (Tex. App. – Houston [14th Dist.] 1990, pet. ref'd). Because appellant has failed to prove a motion to suppress would have been granted, counsel was not ineffective for failing to assert the motion. *See Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim.App. 1998). Finally, the evidence before the jury did not raise the issue of voluntariness, and, as a result, appellant was not entitled to a jury charge on the matter. *See Wagner v. State*, 687 S.W.2d 303, 307 (Tex. Crim. App. 1984). Appellant has

[5] Although an interpreter was requested and employed by appellant during the hearing on motion for new trial, he specifically declined an interpreter for trial.

failed to demonstrate counsel's performance was deficient on this basis.

In sub-issue (d), appellant contends counsel rendered ineffective assistance by failing to warn appellant that by testifying, he would "open the door to introduction of an otherwise inadmissible oral confession." After appellant testified at trial, Fort Worth Police Officer Michael Kennedy, who was in charge of the narcotics investigation, was recalled by the State. On rebuttal, Kennedy testified concerning appellant's detailed account of his partnership with Maldonado and the "mechanics" of their marihuana operation.

It is unclear from appellant's testimony at the hearing on motion for new trial whether counsel specifically advised appellant that by testifying at trial Officer Kennedy could be called to rebut his testimony by testifying to appellant's incriminating statements. It is clear, however, that trial counsel advised appellant not to testify at trial. Furthermore, counsel testified unequivocally that he specifically advised appellant that if he chose to testify, his incriminating statements would "come in" or "he would be asked about them." On this record, we cannot conclude appellant has shown counsel failed to advise him of the consequences of taking the stand.

In sub-issue (e), appellant complains counsel failed to object to the following instruction to the jury:

> You are instructed that if there is any testimony before you in this case regarding the defendant's having committed offenses other than the offense alleged against him in the indictment in this case, you cannot consider said testimony

> for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the credibility of the defendant and for no other purpose.

Over appellant's objection, during the testimony of Fort Worth Police Officer Richard Dotson, who assisted in the execution of the search warrant at the warehouse, the trial court admitted into evidence the Honduras driver's license with appellant's picture on it and identifying him as Arturo Lopez.

Appellant argues that rule 608(b) of the rules of evidence does not allow a witness to be impeached for purposes of attacking his credibility, by proof of specific instances of conduct, other than conviction of crime as provided by rule 609, either on cross-examination or by extrinsic evidence. TEX. R. EVID. 608(b), 609. He also contends the instruction violates article 36.14 of the code of criminal procedure by commenting on the weight of the evidence. TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 2000). By failing to object on one of these grounds, appellant contends counsel rendered ineffective assistance.

The State concedes in its response to appellant's point six, discussed *infra*, that this limiting instruction concerning the use of extraneous offense evidence is erroneous. Because of its conditional nature, we do not perceive the instruction as a comment on the weight of the evidence by the trial court. *See Easter v. State*, 867 S.W.2d 929, 941 (Tex. App. – Waco 1993, pet. ref'd). Additionally, assuming the instruction presents an incorrect statement of the law, we cannot conclude counsel was ineffective by failing to

object to the instruction. As discussed *infra* in our disposition of point four, the evidence of the driver's license was admissible for purposes of linking appellant to the contraband. Arguably, the effect of the limiting instruction was to ostensibly remove this evidence from the jury's consideration on the issue of appellant's guilt, inuring a benefit to appellant. *See id.* Nevertheless, even if counsel performed ineffectively by failing to object, presuming the jury followed the erroneous instruction, we are unable to conclude that appellant was harmed as a result.

Finally, in sub-issue (f), appellant complains that counsel failed to object to the following jury instruction:

> You are instructed that an actor may with another or others jointly possess a controlled substance and such possession need not be exclusive. However, mere presence alone where a controlled substance is being possessed by others does not justify a finding of joint possession.

Appellant proposes that counsel should have objected to the instruction because it authorized the jury to convict appellant "for Maldonado's conduct, without requiring proof that [Appellant] was criminally responsible under the law of parties." Because a charge on joint possession does not necessarily require a charge on the law of parties, and because no such instruction was required in this case, we conclude counsel was not ineffective for failing to object to the charge even though counsel agreed such an instruction may have been beneficial to appellant. Appellant's conduct was sufficient in and of itself to sustain the conviction in this case. *See Goff v. State*, 931 S.W.2d 537, 544-45 (Tex. Crim. App. 1996) (quoting *McCuin v. State*, 505 S.W.2d 827, 830 (Tex. Crim. App. 1974), *cert denied*, 520 U.S. 1171 (1997). Moreover, counsel's explanation

concerning his failure to object to the charge on this basis indicates the decision was clearly a result of trial strategy.[6] That another attorney might have pursued a different course of action will not support a finding of ineffective assistance. *See Hawkins v. State*, 660 S.W.2d 65, 75 (Tex. Crim. App. 1983).

Appellant has not met his burden to rebut the presumption that trial counsel rendered adequate assistance by showing that counsel's performance in each of the instances above fell below an objective standard of reasonableness, or, if so, that he was prejudiced as a result. Nor can we conclude, after reviewing the totality of counsel's representation and the evidence presented at trial, that the combined effect of the alleged errors is so prejudicial as to require reversal – i.e., that absent counsel's errors, the jury would have had a reasonable doubt as to appellant's guilt. *See Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069; *Ewing v. State*, 549 S.W.2d 392, 395 (Tex. Crim. App. 1977), *overruled on other grounds by Hurley v. State*, 606 S.W.2d 887, 890 (Tex. Crim. App. [Panel Op.] 1980). Point three is overruled.

## FALSE DRIVER'S LICENSE

Appellant combines his argument of points four through six. In point four, appellant contends the trial

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[6] Trial counsel testified at the hearing on motion for new trial that he did not request an instruction on the law of parties because "I didn't want to have to argue that we had any contact with Mr. Maldonado as to the marihuana because our contention was that we had no contact and therefore were not guilty either as a party or as the direct principal."

court erred by admitting State's exhibit 110, the Honduras driver's license, over his objection that the exhibit constituted evidence of an extraneous offense – namely, forgery.[7] As previously noted, the driver's license, apparently issued by the Republic of Honduras, bears appellant's photograph and thumbprint, but identifies him as Arturo Lopez. Appellant proposes that this evidence served no other purpose than to suggest he was a "criminal generally" and that he acted in conformity with that character trait. Thus, according to appellant, the license was inadmissible under rule 404(b) of the rules of evidence. TEX. R. EVID. 404(b).[8]

It is the trial court's role to determine whether extraneous offense evidence is relevant to a non-propensity purpose; the trial court's ruling is entitled to deference and will be reversed only for abuse of discretion. *See Ransom v. State*, 920 S.W.2d 288, 300 (Tex. Crim. App. 1996) (op. on reh'g), *cert. denied*, 519 U.S. 1030 (1996); *Montgomery v. State*, 810 S.W.2d 372, 390-91 (Tex. Crim. App. 1991) (op.

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[7] There is no evidence in the record that the State ever sought to prosecute appellant for possession of the false driver's license.

[8] Rule 404(b) provides:

> **(b) Other Crimes, Wrongs or Acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

TEX. R. EVID. 404(b).

on reh'g). We conclude the trial court could have determined that this evidence had relevance, by linking appellant to the contraband in the warehouse, beyond its tendency to prove character, and that its probative value was therefore greater than any prejudicial effect it may have had on the jury. *See Taylor v. State*, 920 S.W.2d 319, 322 (Tex. Crim. App.), *cert. denied*, 519 U.S. 951 (1996); *Victor v. State*, 995 S.W.2d 216, 223 (Tex. App. – Houston [14th Dist.] 1999, pet. ref'd); *Mendiola v. State*, 995 S.W.2d 175, 178 (Tex. App. – San Antonio 1999, pet. granted); *Marx v. State,* 953 S.W.2d 321, 336 (Tex. App. – Austin 1997), *aff'd*, 987 S.W.2d 577 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 574 (1999). Accordingly, no abuse of discretion occurred. Point four is overruled.

In point five, appellant argues the trial court erred by overruling his objection to the prosecutor's cross-examination of appellant concerning the false driver's license because rule 608(b) prohibits the impeachment of a witness by proof of specific instances of conduct other than conviction of crime. TEX. R. EVID 608(b).[9] Because appellant failed to object to the complained of cross-examination on the basis that it was designed to illicit improper impeachment evidence, we conclude appellant has not preserved this issue for appeal. *See Rezac v. State*, 782

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[9] Rule 608(b) provides:

> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

TEX. R. EVID. 608(b).

S.W.2d 869, 870 (Tex. Crim. App. 1990); *Hughbank v. State*, 967 S.W.2d 940, 944 (Tex. App. – Fort Worth 1998, no pet.).

Even assuming error was preserved on this basis and that the trial court erred by allowing the cross-examination, reversal because of improper cross-examination is rarely warranted. *See Cavender v. State*, 547 S.W.2d 601, 603 (Tex. Crim. App. 1977); *Raney v. State*, 958 S.W.2d 867, 876 (Tex. App. – Waco 1997), *pet. dism'd, improvidently granted*, 982 S.W.2d 429 (1998); *Adin v. State*, 727 S.W.2d 310, 311 (Tex. App. – Houston [1st Dist.] 1987, no pet.). In light of the other testimony presented at appellant's trial, we conclude the questions concerning the false driver's license and appellant's responses were not *obviously* harmful to appellant. *See Guzmon v. State*, 697 S.W.2d 404, 408 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1090 (1986); *Cavender*, 547 S.W.2d at 603; *Raney*, 958 S.W.2d at 876; *Adin*, 727 S.W.2d at 311. Point five is overruled.

In point six, appellant contends the trial court erred by instructing the jury that they could not consider evidence of an extraneous offense "for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same in *determining the credibility of the defendant and for no other purpose*." [Emphasis added.] Specifically, he proposes this limiting instruction is violative of rule 608(b) of the rules of evidence by authorizing an improper attack on appellant's credibility. TEX. R. EVID. 608(b). Additionally, appellant proposes the instruction is violative of article 36.14 of the code of criminal procedure as an improper

comment on the weight of the evidence by the trial court. TEX. CODE CRIM. PROC. ANN. art 36.14.

The State concedes the instruction was erroneous. Acknowledging that he made no objection at trial, appellant necessarily argues the erroneous instruction caused him egregious harm. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). To show egregious harm, appellant must show the error was so severe that it deprived him of a fair and impartial trial. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981); *Almanza*, 686 S.W.2d at 171. Appellant speculates that the charge is harmful because it diminishes appellant's credibility and "improperly encourages the jury to give 'more credibility and weight to the State's witnesses than to [him].'"

However, assuming the instruction had the potential for harm, having reviewed the entire jury charge, the evidence in light of the contested issues and probative weight, the complained of argument of the prosecutor, and the record as a whole, we cannot conclude appellant has met his burden to show actual harm resulting from the instruction such that he was deprived of a fair and impartial trial. *See Almanza*, 686 S.W.2d at 171, 174. Moreover, when the evidence is overwhelming, as in this case, it is less likely the jury was influenced by an erroneous charge than by the weight of the probative evidence itself. *See Johnson v. State*, 981 S.W.2d 759, 763 (Tex. App. – Houston [1st Dist.] 1998, pet. ref'd). In other words, the State's case for conviction was not made clearly and significantly more persuasive by the error. *See Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991); *Almanza*, 686 S.W.2d at 172. Point six is overruled.

**LESSER INCLUDED OFFENSE INSTRUCTION**

In points seven and eight, appellant argues the trial court erred by denying his request to include in the jury charge an instruction on the lesser included offenses of possession of over four ounces but less than five pounds of marihuana or possession of over five pounds but less than fifty pounds of marihuana.[10] To determine whether a charge on a lesser included offense is required, we apply the two-prong *Rousseau-Aguilar-Royster* test:

> [F]irst the lesser included offense must be included within the proof necessary to establish the offense charged, and, second, some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense.

*Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App.) (emphasis omitted), *cert. denied*, 510 U.S. 919 (1993); *see also Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985); *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. app. [Panel op.] 1981) (plurality op. on reh'g).

The State concedes that possession of five pounds or less but more than four ounces of marihuana and possession of fifty pounds or less but more than five pounds of marihuana are each included within the proof necessary to establish the offense with which appellant was charged; therefore, the first prong of the test is satisfied. Accordingly, the only

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[10] In both instances, section 481.121 of the health and safety code penalizes possession of an amount up to and including the higher number. TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(3)-(4) (Vernon Supp. 2000).

issue remaining is whether any evidence exists in the record that would permit a rational jury to find that appellant, if guilty, is only guilty of possessing an amount within the parameters of one of the lesser offenses.

Under this second prong of the test, a defendant is entitled to a charge on the lesser included offense, upon his request for the charge, if there is *some* evidence that would permit a jury rationally to find the defendant, if guilty, is guilty only of the lesser offense. *See Rousseau*, 855 S.W.2d at 673; *see also* TEX. CODE CRIM. PROC. ANN. art 37.08 (Vernon 1981). This second prong "preserves the integrity of the jury as the fact finder by ensuring that the jury is instructed as to a lesser included offense only when that offense constitutes a valid, rational alternative to the charged offense." *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997).

At trial, Officer Doston testified he assisted in the execution of the warrant at appellant's warehouse and was designated the "evidence custodian." He stated that he took possession of the marihuana and that each "block" was numbered and categorized as to its location in the warehouse, placed in individual boxes, and sealed. Eighty-three blocks of marihuana were recovered and transported to the police property room.

John Harris, a forensic chemist with the Tarrant County Medical Examiner's Office, testified he retrieved the contraband from the police property room and re-categorized the blocks according to size. although the blocks varied in size, they all appeared to contain marihuana from a visual inspection. He photographed the blocks and weighed each one individually. The total weight of the eighty-three blocks was 613.67 pounds, excluding the

estimated weight of the packaging and the seeds and stems. He then dusted random blocks for fingerprints. After that, he took a sample from each one of the blocks and examined the sample under the microscope. He selected forty-nine random samples for additional testing. Each one of the tests yielded positive results for marihuana. Thirty-four other "subsamples" were preserved for evidence at trial in the event the excess marihuana was burned. Each subsample weighed "about seven or eight grams." The subsamples, combined, weighed less than five pounds. In making his weight determinations, he estimated the total weight of the stems and seeds to be at most nine or ten pounds.[11] He stated that this type of "representative sampling" was based upon accepted scientific standards and that he followed established scientific procedures in conducting the tests. Although he failed to keep his notes concerning the individual weights of each individual block, he testified each one weighed less than fifty pounds.

In point seven, appellant appears to complain of the manner of testing used by the medical examiner's office. He points to the alleged "sloppy investigation and procedures employed" in Harris's selection and testing of the random samples and proposes that a juror could have concluded appellant was guilty, if at all, of possessing five pounds or less but more than four ounces of marihuana, or the amount of the subsamples of marihuana preserved for testing.

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[11] The term "marihuana" does not include "the mature stalks of the plan" or "the sterilized seeds of the plant that are incapable of germination." TEX. HEALTH & SAFETY CODE § 481.002(26)(B), (E).

We conclude Harris's testimony was sufficient to support the inference that the random samples were representative of the entire amount of marihuana. *See Gabriel v. State*, 900 S.W.2d 721, 726 (Tex. Crim. App. 1995). Contrary to appellant's assertion, there is no evidence that Harris was derelict or conducted an inadequate sampling or investigation. *Cf. Enriquez v. State*, 988 S.W.2d 899, 903 (Tex. App. – Houston [14th Dist.] 1999, pet. granted); *Saenz v. State*, 733 S.W.2d 265, 267 (Tex. App. – Tyler 1987, no pet.). Accordingly, there is nothing to suggest that appellant, if guilty, was guilty of only possessing the amount of marihuana represented by the subsamples preserved for evidence at trial. Therefore, the trial court did not err by denying appellant's request for an instruction on the lesser included offense of possession of five pounds or less but more than four ounces of marihuana. Point seven is overruled.

In the alternative, appellant contends in point eight that given Officer Kennedy's failure to keep notes, his destruction or loss of evidence, and his contradictory testimony, the jury could have disbelieved his testimony and determined appellant was guilty, if at all, of possessing over five pounds but less than fifty pounds of marihuana based on the fingerprint evidence found on one block – the only evidence linking him to the contraband. Appellant's argument fails because the fact that the jury might disbelieve crucial evidence pertaining to the greater offense is not enough to entitle a defendant to a charge on a lesser included offense. *See Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994); *McElhaney v. State*, 899 S.W.2d 15, 18 (Tex. App. – Tyler 1995, pet. ref'd, untimely filed). The credibility of evidence may not be considered in determining whether an instruction on a lesser offense

should be given. *See Banda v. State*, 890 S.W.2d 42, 60 (Tex. Crim. App. 1994), *cert. denied*, 515 U.S. 1105 (1995). The State's witnesses' version of events certainly did not raise evidence that, if guilty, appellant was guilty of possessing only one block of the eighty-three blocks of marihuana. And, appellant's testimony only raised the defensive theory that he did not knowingly possess *any* of the marihuana and was not involved in the drug operation at all. Consequently, there was no evidence directly germane to the lesser offense for the jury to consider it a valid, rational alterative to the charged offense. *See Saunders*, 840 S.W.2d at 391. Accordingly, we conclude no error is implicated by the trial court's refusal to instruct the jury on the lesser included offense of possession of fifty pounds or less but more than five pounds of marihuana. Point eight is overruled.

The judgment of the trial court is affirmed.

WILLIAM BRIGHAM
JUSTICE

PANEL A: CAYCE, C.J.; DAUPHINOT J.; and WILLIAM BRIGHAM, J. (Retired, Sitting by Assignment).

DAUPHINOT, J. filed a concurring opinion.

DO NOT PUBLISH
Tex. R. App. P. 47.3(a)

[DELIVERED MAY 18, 2000]

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## CONCURRING OPINION

I concur in the result, but disagree with the majority's conclusion that trial counsel no longer represented co-defendant Maldonado at the time of Appellant's trial. Until trial counsel filed a motion to withdraw or a motion to substitute counsel with the trial court, and until the trial judge granted the motion, trial counsel was obligated to represent Maldonado.[12] Notice to an assistant district attorney is not binding on the trial judge. I therefore disagree with the majority's conclusion that by shipping Maldonado's file to a lawyer of trial counsel's choosing, and by notifying the assistant district attorney, trial counsel dissolved the attorney-client relationship both retroactively and prospectively.

The record is clear, however, that trial counsel informed both Appellant and Maldonado of the potential conflict of interest. appellant, nevertheless, chose to go to trial with trial counsel as his attorney. A client may waive

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[12] *See Buntion v. Harmon*, 827 S.W.2d 945, 948 n.3 (Tex. Crim. App. 1992) (stating once attorney-client relationship is established, any potential disruption of relationship is subject to careful scrutiny; therefore, it is well settled that attorney-client relationship may not be severed by either attorney or client without justifying severance to trial court); *Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988) (holding that trial counsel, whether retained or appointed, has duty, obligation, and responsibility to consult with and fully advise client regarding appellate process); *Steel v. State*, 453 S.W.2d 486, 487 (Tex. Crim. App. 1970) ("[R]etained counsel, even one who has not been fully compensated for past services or compensated for further service, cannot wait until a critical state of the proceedings is reached and bow out without notice to the court and the accused. . . .").

an actual conflict of interest.[13] I would hold that Appellant was aware of the conflict of interest and waived the conflict of interest. For these reasons, I concur in the result reached by the majority.

LEE ANN DAUPHINOT
JUSTICE

DO NOT PUBLISH
Tex. R. App. P. 47.3(a)

[DELIVERED MAY 18, 2000]

[13] *See Maya v. State*, 932 S.W.2d 633, 636 (Tex. App. – Houston [14th Dist.] 1996, no pet.); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(c), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9).

**APPENDIX H**

CASE NO. 0572256D

| | | |
|---|---|---|
| THE STATE OF TEXAS | § | IN THE CRIMINAL DISTRICT |
| VS | § | COURT NUMBER FOUR |
| JESUS RIVERA CANTU | § | TARRANT COUNTY, TEXAS |

**JUDGMENT ON JURY VERDICT OF GUILTY PUNISHMENT FIXED BY COURT OR JURY – NO PROBATION GRANTED**

**Judge Presiding**: HON. HOWARD FENDER

**Date of Judgment**: NOVEMBER 13, 1998

Attorney for State District Attorney: TIM CURRY

Assistant District Attorney: TERRY J. BARLOW
AMY COLLUM

Attorney for Defendant: ABE FACTOR
KIMBERLEY S. CAMPBELL

Charging Instrument: INDICTMENT

Offense Date: NOVEMBER 30, 1994

Convicted Offense: POSSESSION OF MARIHUANA OF 2,000 POUNDS OR LESS, BUT MORE THAN 50 POUNDS

| Degree | | Count | Plea |
|---|---|---|---|
| 2ND | : | ONE | NOT GUILTY |
| Findings on Deadly Weapon | : | NONE | |
| Plea to Enhancement Paragraph(s) | : | NONE | |

| | | |
|---|---|---|
| Plea to Habitual Paragraph(s) | : | NONE |
| Findings on Enhancement/Habitual Paragraph(s) | : | NONE |
| Jury Verdict | : | GUILTY |
| Punishment Assessed By | : | JURY |
| Date Sentence Imposed | : | NOVEMBER 13, 1998 |
| Date to Commence | : | NOVEMBER 13, 1998 |
| Punishment | : | COUNT ONE – TWENTY (20) YEARS |
| Place of Confinement | : | INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE |
| Fine | : | $10,000.00 TEN THOUSAND DOLLARS AND ZERO CENTS |
| Time Credited | : | 4 DAYS |
| Court Costs | : | $194.50 |
| Reparation | : | NONE |
| Restitution | : | NONE |
| | : | $10000.00 FINE TO BE PAID AT $2000.00 A YEAR UNTIL TOTAL AMOUNT IS PAID AS A CONDITION OF PAROLE |

On this day, set forth above, this cause came for trial, and the State appeared by the above-named attorney, and the Defendant appeared in person in open court, the above-named counsel for Defendant also being present, or, where a Defendant is not represented by counsel, that the

Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel; and the said Defendant having been duly arraigned and it appearing to the Court that Defendant was mentally competent, and having pleaded as shown above to the indictment herein, both parties announced ready for trial and thereupon a jury, to wit, the above named foreman and eleven others, was duly selected, impaneled and sworn, who having heard the indictment read and the Defendant's plea thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider the verdict, and afterward were brought into Court by the proper officer, the Defendant and Defendant's counsel being present, and returned into open court the verdict set forth above, which was received by the Court, and is here now entered upon the minutes of the Court as shown above.

Thereupon, the Defendant elected to have punishment assessed by the above shown assessor of punishment, and when shown above that the indictment contains enhancement paragraph(s), which were not waived, and alleges Defendant to have been convicted previously of any felony or offenses for the purpose of enhancement of punishment, then the Court asked Defendant if such allegations were true or false and Defendant answered as shown above. And when Defendant is shown above to have elected to have the jury assess punishment, such jury was called back into the box and heard evidence relative to the question of punishment and having been duly charged by the court, they retired to consider such question, and after having deliberated, they returned into Court the verdict shown under punishment above; and when Defendant is shown above to have elected to have punishment fixed by

the Court, in due form of law further evidence was heard by the Court relative to the question of punishment and the Court fixed the punishment of the Defendant as shown above.

IT IS THEREFORE CONSIDERED AND ORDERED by the Court, in the presence of the Defendant, that the said judgment be, and the same is hereby in all things approved and confirmed, and that the Defendant is adjudged guilty of the offense set forth above as found by the verdict of the jury, as set forth above, and said Defendant be punished in accordance with the Jury Verdict or the Court's Finding, as shown above and that the Defendant is sentenced to a term of imprisonment or fine or both, as set forth above, and that said Defendant be delivered by the Sheriff to the Director of the Institutional Division of the Texas Department of Criminal Justice, or other person legally authorized to receive such convicts for the punishment assessed herein, and the said Defendant shall be confined for the above named term in accordance with the provisions of law governing such punishment and execution may issue as necessary.

And, if shown above that the Defendant has been duly and legally convicted of a prior offense by showing the court, cause number, and offense together with the punishment for each offense and date Defendant was sentenced for such offense in accordance with such conviction, then it is further ORDERED AND ADJUDGED that the punishment herein adjudged against said Defendant shall begin when the judgment in such prior offense, when shown above, shall have ceased to operate.

And the said Defendant is remanded to jail until said Sheriff can obey the direction of this judgment.

/s/ H.M. Fender
PRESIDING JUDGE

Date Signed:
NOVEMBER 17, 1998

Notice of Appeal : _____
Mandate Received : _____